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Supreme Court of the United States

OCTOBER TERM, 1951

No. 25

SUTPHEN ESTATES, INC., APPELLANT,

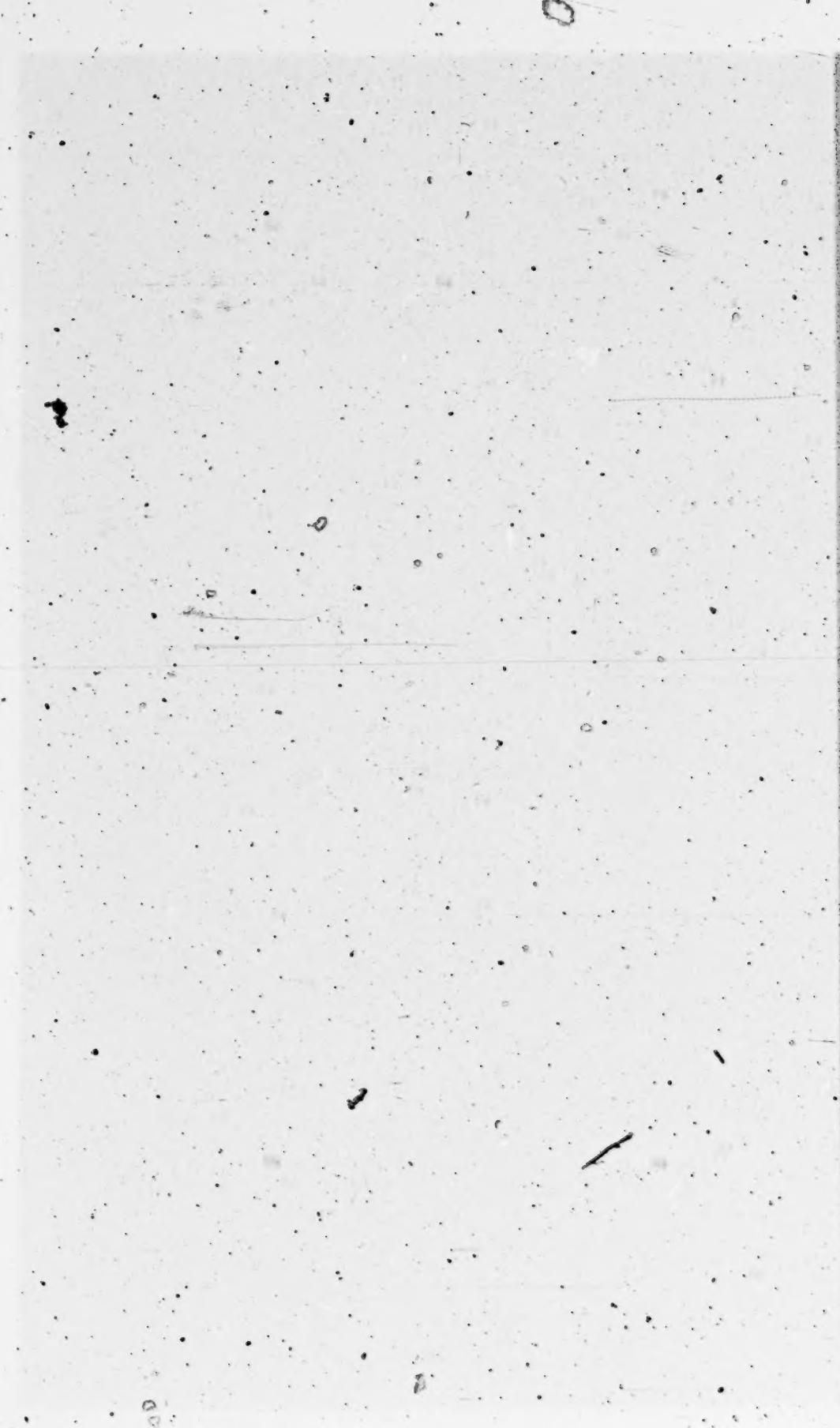
vs.

THE UNITED STATES OF AMERICA, LOEW'S
INCORPORATED, WARNER BROS. PICTURES,
INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

FILED APRIL 9, 1951.

JURISDICTION POSTPONED MAY 14, 1951.



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**UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK**

Equity No. 87-273

**UNITED STATES OF AMERICA, PLAINTIFF,
against**

**LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., WAR-
NER BROS. PICTURES DISTRIBUTING CORPORATION (formerly
known as VITAGRAPH, INC.), WARNER BROS. CIRCUIT MAN-
AGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM
CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA
PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PIC-
TURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNI-
VERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EX-
CHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED
ARTISTS CORPORATION, DEFENDANTS.**

FINAL DECREE

The plaintiff, having filed its petition herein on July 29, 1938, and its amended and supplemental complaint on November 14, 1940; the defendants having filed their answers to such complaint, denying the substantive allegations thereof; the court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 11, 1947; the plaintiff and the defendants having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this case to this court for further proceedings in conformity with its opinion dated May 3, 1948; this court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this court; a consent decree having been entered on November 8, 1948, against the defendants [fol. 15] Radio-Keith Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation; orders having been entered on stipulation against the Fox, Loew, and Warner defendants respectively, and Loew having further stipulated in the record, with respect to certain theatre interests held jointly with others; and a consent judgment having been entered on March 3, 1949 against

defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation; and an order having been entered on April 21, 1949, severing and terminating, as of March 3, 1949, this action as against defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation; and an order having been entered on January 18, 1950 severing and terminating as of November 8, 1948 the action as against defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation;

Now, having considered the proposals of the parties, having duly received additional evidence and heard further arguments after entry of the consent decree against the RKO defendants, and having rendered its opinion on July 25, 1949, and having filed its findings of fact and conclusions of law in accordance with said opinion:

It is hereby ordered, adjudged, and decreed that the decree heretofore entered by this court on December 31, 1946 is hereby amended to read as follows:

I

1. The findings of fact and conclusions of law heretofore made are superseded by the findings and conclusions now entered in support of this decree.

2. The complaint is dismissed as to all claims made against the defendants herein based upon their acts as pro- [fol. 16] ducers, whether as individuals or in conjunction with others.

II

Each of the defendant distributors, Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.); Twentieth Century-Fox Film Corporation, and the successors of each of them (including but not limited to companies resulting from divorceement), and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in

writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under [fol. 17] the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant or with theatres in new circuits which may be formed as a result of divorceement. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the ex-

tent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

[fol. 18] 8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

III

Each of the defendant exhibitors, Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation; and the successors of each of them (including but not limited to companies resulting from divorceement), and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined and restrained:

1. From performing or enforcing agreements, if any, referred to in Paragraphs 5 and 6 of the foregoing Section II hereof to which it may be a party.

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

[fol. 19] 4. From making or continuing leases of theatres under which it leases any of its theatres to another de-

fendant or to an independent operating a theatre in the same competitive area in return for a share in the profits.

5. From continuing to own or acquiring any beneficial interests in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant, or with any company resulting from divorcements provided for in decrees entered in this cause.

6. From acquiring a beneficial interest in any additional theatre unless the acquiring company shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures, provided, however, that the acquisition of a theatre as a replacement for a theatre, held or acquired in conformity with this decree, which may be lost through physical destruction, conversion to non-theatrical purposes, disposition (other than the disposition of a theatre in compliance with this decree) or expiration or cancellation of the lease under which such theatre is held, shall not be deemed to be the acquisition of an additional theatre.

7. From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV

1. Within six months from the entry of this decree each of the major defendants named in Sections II and III of this decree shall submit a plan for the ultimate separation of its distribution and production business from its exhibition business. Upon the filing of such a plan, the Government shall have three months within which to file objections thereto and propose amended or alternative plans for accomplishing the same result. Such further proceedings with respect to such plans as the court may then order shall then be had. Such plans shall, in any event, provide for the completion of such separation within three years from the date of the entry of this decree.

2. Within one year from the entry of this decree the Government and each of the defendant exhibitors named in Section III of this decree shall submit respectively such plans for divestiture of theatre interests, other than those heretofore ordered to be divested, which they believe to be

adequate to satisfy the requirements of the Supreme Court decision herein with respect to such divestiture. Upon the filing of such a plan the Government and the affected defendant shall have six months within which to file objections thereto and propose amended or alternative plans for accomplishing the same result. Such further proceedings with respect to such plans may then be had as the court may then order.

3. No defendant distributor named in Section II of this decree, and no distributor company resulting from the divorceement ordered herein, shall engage in the exhibition business; and no defendant exhibitor named in Section III of this decree, and no exhibitor company resulting from the divorceement ordered herein, shall engage in the distribution business, except that permission to a distributor company resulting from divorceement to engage in the exhibition business or to an exhibitor company resulting from divorceement to engage in the distribution business may be granted by the court upon notice to the United States and upon a showing that any such engagement shall not unreasonably [fol. 21] restrain competition in the distribution or exhibition of motion pictures.

4. No exhibitor company resulting from the divorceement ordered herein shall acquire directly or indirectly any interest in any theatre divested by any other defendant pursuant to any plan ordered under Paragraph 2 of Section IV hereof or pursuant to Paragraph C 1 of Section III of the Consent Judgment as to the Paramount defendants entered March 3, 1949.

V

Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries.

VI

The defendant distributors named in Section II of this decree and any others who are willing to file with the American Arbitration Association their consent to abide by the rules of arbitration and to perform the awards of arbitrators, are hereby authorized to set up an arbitration system with an accompanying Appeal Board which will become effective as soon as it may be organized, upon terms to be settled by the court upon notice to the parties to this action.

VII

[fol. 22] The provisions of the existing consent decree are hereby declared to be of no further force or effect, except in so far as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable.

VIII

1. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on notice to any defendant bound by this decree, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (a) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present. For the purpose of securing compliance with this decree any defendant upon the written

request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of [fol. 23] the matters contained in this decree as from time to time may be necessary for the purpose of enforcement of this decree.

2. Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

IX

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree, and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Dated: February 8, 1950.

AUGUSTUS N. HAND,

United States Circuit Judge.

HENRY W. GODDARD,

United States District Judge.

ALFRED C. COXE.

United States District Judge.

[fol. 24] UNITED STATES DISTRICT COURT

Equity No. 87-273

(Title omitted)

CONSENT JUDGMENT AS TO THE WARNER DEFENDANTS

The Warner defendants having consented to the entry of this judgment without admission by them in respect to any issues or matters in this cause open on remand, and the Court having considered the matter,

NOW, THEREFORE, UPON CONSENT OF THE PARTIES HERETO WITH RESPECT TO THE IS-

SUES AS TO WHICH ACTION WAS SUSPENDED OR RESERVED BY THE COURT, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I

This judgment is rendered and entered in lieu of and in substitution for the decrees of this Court dated December 31, 1946; as amended, and February 8, 1950. This judgment shall be of no further force and effect and this cause shall be restored to the docket without prejudice to [fol. 25] either party if the proposed reorganization of the Warner defendants shall not have been approved by the stockholders of Warner Bros. Pictures, Inc. within ninety (90) days from the entry of this judgment. Upon such approval by the stockholders this cause shall be severed and terminated against the Warner defendants as of the date of this judgment.

II

The Complaint is dismissed as to all claims made against the Warner defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

III

The defendant Warner Bros. Pictures Distributing Corporation, its subsidiaries in which it has more than a fifty per cent interest, its successors, its officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

[fol. 26] 4. From granting or enforcing any clearance against theatres in substantial competition with the theatre

receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant* or with theatres in new circuits, which may be formed as a result of divorce, provided for in judgments entered in this cause. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres usually comprising a circuit.

[fol. 27] 7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty percent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

* As used in this judgment, the term "defendant" or "defendants" means the defendants, or any of them, in Eq. Cause No. 87-273.

8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

IV

The defendants Warner Bros. Pictures Inc., and Warner Bros. Circuit Management Corporation, their theatre subsidiaries in which they have more than a fifty per cent interest, their successors, their officers, agents, servants and employees are each hereby enjoined:

1. From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing Section III hereof to which it may be a party;

2. From making pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

[fol. 28] 3. From making agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From acquiring any beneficial interest in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant, or with any company which may be formed as a result of divorce provided for in judgments entered in this cause.

6. From acquiring a beneficial interest in any theatre provided that:

(a) Until the divorce and divestiture* provisions

* Divestiture under the terms of this paragraph 6 shall be deemed to mean the disposition of Warner's interest in the theatres referred to in paragraph 1 of Section V other than

of this judgment have been carried out, beneficial interests in theatres may be acquired

(i) As a substantially equivalent replacement for and in the immediate neighborhood of wholly owned theatres** held or acquired in conformity with this judgment which may be lost through physical destruction or conversion to non-theatrical purposes;

[fol. 29] (ii) In renewing leases covering any wholly owned theatre held or acquired in conformity with this judgment or in acquiring an additional interest in any such theatre under lease;

(iii) As a substantially equivalent replacement for any wholly owned theatre held or acquired in conformity with this judgment which has been lost through inability to obtain a renewal of the lease thereof upon reasonable terms, if Warner or its exhibitor successor shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition.

(b) After the divorce and divestiture provisions of this judgment have been carried out, Warner's exhibitor successor may acquire a beneficial interest in any theatre only in the situations covered by paragraphs (i) and (ii) of the preceding subsection (a) unless Warner's exhibitor successor shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition will not unduly restrain competition.

7. From operating, booking or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

theatres which Warner or its exhibitor successor may in the future be required to dispose of thereunder (as distinguished from those presently required to be disposed of) and the theatres referred to in paragraph 3 of Section V.

** As used in this judgment the word "theatre" means "motion picture theatre in the United States" and the phrase "wholly owned theatre" means a theatre in which Warner or its exhibitor successor, or Warner or its exhibitor successor together with persons who are solely investors, owns a beneficial interest of 95% or more in the lease or fee thereof.

8. From making any agreement which restricts the right of any other exhibitor to acquire a motion picture theatre.

9. From acquiring in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres.

[fol. 30]

V

I. Warner or its successor shall dispose of all its interest in the following theatres in the following towns:

Ansonia, Conn. One theatre; purchaser to have choice of theatres if Ansonia is designated as herein provided.¹

Appleton, Wis. One theatre if by the end of one year from the date of this judgment an independent² theatre is not regularly playing first run, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing first run.³ If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

Bristol, Conn. One theatre.

[fol. 31]. Chester, Pa. One theatre.

Clifton Forge, Va. One theatre.

Clinton, Mass. One theatre.

¹ Within four months after the entry of this judgment, Warner shall designate two cities from among Ansonia, Conn., Gettysburg, Pa., Pleasantville, New Jersey, and Sidney, Ohio, in which the purchaser is to have his choice of theatre. No offer for the smaller theatre in each of such two cities shall be accepted until thirty days have elapsed after the properties have been offered for sale. The larger theatre in each of such two cities shall be sold if a reasonable offer therefor is made either during the thirty days or thereafter before the acceptance of a reasonable offer for the smaller theatre.

² As used herein, the term "independent" or "independently" refers to any theatre not affiliated with any of the defendants in Eq. Cause No. 87-273.

³ As used in this judgment "first run" means first run of the eight distributor defendants in Eq. Cause 87-273.

Coshocton, Ohio. One theatre, if at any time during a period of 3 years from the date of this judgment two Warner theatres play first run at a time when there is not more than one other theatre operating first run in Coshocton, except that there may be shown at the Pastime Theatre pictures for which a competitor who has had an opportunity to request licenses had not made an offer, or had made an insubstantial offer, provided that upon the sole determination by the Attorney General or an Assistant Attorney General that a competing first run theatre will be adversely affected by the first run showing of such pictures at such theatre, Warner shall cease the showing of any pictures first run at such theatre within 30 days after receipt by Warner of the notice by the Attorney General of his determination.

Danbury, Conn. Empress or Palace, or Capitol. If Capitol is sold defendant or its successor must file with the Attorney General and the Court a statement of intention by the purchaser to operate said theatre on a first run basis.

Donora, Pa. Harris or Princess.

Dover, N. J. One-theatre.

[fol. 32] Elmira, N. Y. One theatre, if at any time during a period of 3 years from the date of this judgment three Warner theatres play feature films first run at a time when there is not more than one other theatre operating first run in Elmira.

Fairmont, W. Va. One theatre if by the end of one year from the date of this judgment an independent theatre is not regularly playing first run, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

Gettysburg, Pa. One theatre; purchaser to have choice of theatres if Gettysburg is designated as provided in footnote 1.

Greensburg, Pa. One theatre.

Hagerstown, Md. One theatre.

Hoboken, N. J. One theatre.

Irvington, N. J. One theatre.

Lawrence, Mass. One theatre.

Lexington, Va. One theatre.

Manchester, Conn. One theatre.

[fol. 33] Martinsburg, W. Va. Apollo or Central and Strand or State.

Medina, N. Y. One theatre.

Millville, N. J. One theatre.

Milwaukee, Wis. Warner or the Alhambra if by the end of one year from the date of this judgment an independent theatre is not regularly playing first run, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

Montclair, N. J. Claridge or Wellmont or Montclair.

Newark, N. J. Stanley or Mayfair and Central or Tivoli or Savoy; the Ritz shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in the footnote hereto,⁴ if during a [fol. 34] period of three years from the date of this judgment an independent operator of a theatre in the Springfield Avenue zone, having a theatre suitable for first neighborhood run operation, is not afforded a reasonable opportu-

⁴For a period of three years, defendant shall not license:

a. More than 60% of the feature films released by the major distributors for first neighborhood run exhibition in any fiscal year, except as to pictures for which competitors who have had an opportunity to request licenses have not made an offer or have made an insubstantial offer; and

b. More than 48 feature films from among the eighty pictures constituting the aggregate of the ten pictures released by each of the major distributors, respectively, for first neighborhood run exhibition in any fiscal year, which are allocated by the respective distributor to its highest selling bracket or brackets, except as to pictures for which competitors who have had an opportunity to request licenses have not made an offer or have made an insubstantial offer.

nity to procure films for such theatre on a first neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's ruling; [fol. 35] Capitol or Globe if by the end of one year from the date of this judgment an independent theatre is not regularly playing second run downtown Newark, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing second run downtown Newark. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

New Britain, Conn. Strand or Embassy or Capitol, but if Capitol is selected defendant shall divest one other theatre if by the end of a year from the disposition of the Capitol an independent theatre is not regularly playing first run or if thereafter (during a period of five years from the date of the disposition of the Capitol) for the greater part of any year an independent theatre is not regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

[fol. 36] Passaic, N. J. Montauk or Capitol or Central or Playhouse. If the Playhouse⁵ is disposed of in lieu of one of the other three theatres, then one of the other three theatres shall be disposed of if by the end of a year from

⁵ Warner or its exhibitor successor shall file with the Court and the Attorney General a statement of intention by the purchaser of the Playhouse to operate the Playhouse on a first run basis.

the date of the disposition of the Playhouse no independent theatre is regularly playing on a first run basis or if thereafter (during five years from the date of the disposition of the Playhouse) for the greater part of any year there is not an independent theatre playing on a first run basis. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

3

Paterson, N. J. One theatre.

Philadelphia, Pa.—Midway or Allegheny; Colonial or Orpheum or Vernon; Rexy⁶ and Alhambra or Plaza or Broadway or Savoia, and one theatre shall be divested in addition to the two hereinabove required to be divested in this zone, which shall be the Broadway or the Savoia or [fol. 37] another theatre operated on a first neighborhood run basis, if by the end of one year from the disposition of the Rexy an independent theatre is not regularly playing on a first neighborhood run, or if thereafter (during a period of five years from the date of disposition of the Rexy) for the greater part of any year an independent theatre is not regularly playing on a first neighborhood run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant. Colney or Fernrock⁷ and Diamond or Keystone⁸; the Oxford or the Liberty shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4 (except substitute therein "second" for "first" neighborhood run), if during a period of three years from the date of this judgment an independent operator or operators of two theatres in the Frankford and Mayfair zones (formerly known as Frankford zone), having theatres suitable for second neighborhood run operation, is or are not afforded a reasonable opportunity to procure films for such

⁶ Warner or its exhibitor successor shall file with the Attorney General and the Court a statement of intention by the purchaser of the Rexy to operate the Rexy on a first neighborhood run basis.

⁷ At the option of Warner, the Bromley may be chosen as one of the two theatres to be divested.

[fol. 38] theatres on a second neighborhood run basis if he or they so desire. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator or operators of its election, which shall be made within 30 days after the Court's ruling; the Forum shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4 (except substitute therein "Forum availability" for "first neighborhood run exhibition"), if during a period of three years from the date of this judgment an independent operator of a theatre in the Frankford zone, having a theatre suitable for playing on the same availability as the Forum, is not afforded a reasonable opportunity to procure films for such theatre on such availability if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's ruling; Wishart or Richmond, if an independent theatre in the Kensington zone is not regularly playing third neighborhood run by the end of a year from the date of this judgment or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre in the Kensington zone is not regularly playing third neighborhood run. If the parties dis-

agree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

[fol. 40] The Terminal if at any time for a period of 3 years after Warner begins operating the theatre pursuant to the provisions of paragraph 8 of this section V it is operated on a regular policy of exhibiting feature films earlier than seventeen to twenty-one days after first neighborhood run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination in which event the burden of proof shall be on the defendant.

The Wynne if at any time for a period of 3 years from the date of this judgment it is operated on a regular policy of exhibiting feature films earlier than third neighborhood run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination in which event the burden of proof shall be on the defendant.

Pittsburgh, Pa. Strand or Center; Sheridan or Regent, or Enright or Cameraphone. If Cameraphone is disposed of in lieu of one of the other three theatres, then one other of these three theatres shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4, if during a period of three years from the date of this judgment an independent [fol. 41] operator of a theatre in the East Liberty zone having a theatre suitable for first neighborhood run operation, is not afforded reasonable opportunity to procure feature films for such theatre on a first neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made with-

in 30 days after the Court's ruling; and one other of these three theatres shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4 (except substitute therein "second" for "first" neighborhood run), if during a period of three years from the date of this judgment an independent operator of a theatre in the East Liberty zone having [fol. 42] a theatre suitable for second neighborhood run operation is not afforded a reasonable opportunity to procure feature films for such theatre on a second neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's ruling.

The Schenley shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4, if during a period of three years from the date of this judgment an independent operator of a theatre in the Oakland zone, having a theatre suitable for first neighborhood run operation, is not afforded a reasonable opportunity to procure films for such theatre [fol. 43] on a first neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator

of its election, which shall be made within 30 days after the Court's ruling.

Pleasantville, N. J. One theatre, purchaser to have choice of theatres if Pleasantville is designated as provided in footnote 1.

Portsmouth, Ohio. Columbia or LaRoy.

Punxsutawney, Pa. One theatre.

Racine, Wis. One theatre.

Salem, Oreg. Elsinore or Capitol if at any time during a period of 3 years from the date of this judgment two Warner theatres play first run at a time when there is not more than one other theatre operating first run in Salem, [fol. 44] except that there may be shown at the Capitol Theatre pictures for which a competitor who has had an opportunity to request licenses had not made an offer or had made an insubstantial offer, provided that upon the sole determination by the Attorney General or an Assistant Attorney General that a competing first run theatre will be adversely affected by the first run showing of such pictures at such theatre, Warner shall cease the showing of any pictures first run at such theatre within 30 days after receipt by Warner of the notice by the Attorney General of his determination.

Sharon, Pa. One theatre.

Sheboygan, Wis. Two theatres.

Sidney, Ohio. One theatre, purchaser to have choice of theatre if Sidney is designated as provided in footnote 1.

Silver Spring, Md. If at any time during a period of three years from the date of this judgment the Flower Theatre in Silver Spring is subordinated in playing position to the Silver Theatre while the latter is operated by Warner the question of divestiture of one theatre shall be reopened.

State College, Pa. Cathaum or State.

Staunton, Va. One theatre, if by end of a year there is not an independent theatre regularly playing first run or if thereafter (during a period of 5 years from the date [fol. 45] of this judgment) during the greater part of any year there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

Tarentum, Pa. One theatre, if by end of a year there

is not an independent theatre regularly playing first run or if thereafter (during a period of 5 years from the date of this judgment) during the greater part of any year there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

Titusville, Pa. One theatre.

Torrington, Conn. Warner or Palace.

Tyrone, Pa. One theatre.

Warren, Pa. One theatre.

Washington, D. C. Tivoli or Sheridan.

Washington, Pa. One theatre if by end of a year there is not an independent theatre regularly playing first run or if thereafter (during a period of 5 years from the date of this judgment) during the greater part of any year [fol. 46] there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

Waynesboro, Pa. One theatre.

Wellsville, N. Y. One theatre.

West Chester, Pa. One theatre.

Wilkinsburg, Pa. Roland or State.

Willimantic, Conn. One theatre.

Wilmington, Del. Warner or Queen or Arcadia or Grand.

York, Pa. One theatre, if by end of a year there is not an independent theatre regularly playing first run or if thereafter (during a period of 5 years from the date of this judgment) during the greater part of any year there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

2. Warner or its successor shall within one year dispose of all of the interest of Warner in one half of the theatres presently required to be disposed of and within [fol. 47] two years of all of the theatres presently required to be disposed of, under paragraph 1 of this Section V. All theatres which may in the future be required to be

disposed of under paragraph 1 of this Section V shall be disposed of within six months after the time they are required to be divested. All such dispositions shall be made to parties not defendants in Eq. Cause No. 87-273 or owned or controlled by or affiliated with defendants therein, or their successors.

3. As to not to exceed 12 of the theatres presently required to be disposed under paragraph 1 of this Section V, in the event that Warner or its exhibitor successor is unable to sell on reasonable terms its interest therein, Warner or its exhibitor successor upon application to the Court in any such case, and with the approval of the Court first obtained, may lease or sublease the same to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein; on condition, however, that no such lease or sublease shall contain any rental provisions based upon a share of the profits of the theatre covered by the lease or any other theatre; and further on condition that Warner or its exhibitor successor shall thereafter sell its interest in any such theatre so leased or subleased as soon thereafter as it can do so upon reasonable terms, and in any event prior to the expiration of such lease or sublease.

4. The Cadet, Elite and Poplar theatres in Philadelphia, Pa., shall be made available for a period of one year for sale or lease. Preference shall be given reasonable offers for motion picture theatre purposes, and until 30 days after making these properties so available for sale, no offer for non-motion picture purposes shall be accepted. After one year, these properties may be retained, sold or leased for any purpose; provided that if within a period of three years from the expiration of such year Warner desires to operate any of said theatres as [fol. 48] a motion picture theatre, Warner shall notify the Attorney General of its intention so to do, and if within 14 days thereafter the Attorney General notifies Warner that such operation will unduly restrain competition in the exhibition of featured motion pictures in the same competitive area as such theatre, Warner may present the matter to the Court for its determination.

5. If Warner or its exhibitor successor should at any time after the expiration of the present leases or the renewals thereof make the Playhouse premises in Ridge-

wood, N. J., available as a whole for sale or lease, preference shall be given to reasonable offers for motion picture theatre purposes, and until 30 days after making these premises so available, no offer for non-motion picture theatre purposes shall be accepted.

6. If the existing decree entered in the United States District Court for the Northern District of Illinois, Eastern Division, in the case of Florence B. Bigelow, et al., against RKO Radio Pictures Inc., et al., shall be modified or vacated, and if, after such modification or vacating, the competitive situation in outlying Chicago (outlying Chicago for the purposes hereof including the entire city of Chicago except the downtown portion of Chicago and also including Berwyn, Blue Island, Chicago Heights, Evanston, La Grange and Oak Park) shall be less favorable for the independent exhibitors in outlying Chicago (an independent exhibitor for the purposes hereof meaning an exhibitor who is not a defendant herein or owned or controlled by or affiliated with a defendant herein), and if such less favorable competitive situation shall be shown by the Attorney General to the satisfaction of the Court in which this consent judgment is entered, then such Court may order such relief against, or with respect to, the theatres of Warner or its exhibitor successor located in outlying Chicago as it may deem just or proper in order to create proper competitive conditions in outlying Chicago or in any particular section thereof.

[fol. 49] ~ 7. This judgment shall not affect the rights and obligations of the parties under the consent orders entered in Eq. Cause No. 87-273 by stipulation between the plaintiff and the Warner defendants with respect to theatres held in conjunction with non-defendants.

8. Nothing in this judgment shall be construed to prohibit Warner until the divorce required herein has been effectuated and thereafter its exhibitor successor from owning and operating one theatre in Bridgeport, Conn., and one theatre in Harrison, New Jersey, to be constructed in accordance with existing contractual commitments or amendments thereto, or to prohibit Warner from retaking and operating, in the future, the following theatres of Warner now under lease to others.

Aldine Theatre, Wilmington, Del.

VI

A. The defendant, Warner Bros. Pictures, Inc., shall present to its stockholders not later than ninety (90) days after the entry of this judgment, a plan of reorganization to effect the divorce of its theatre assets located in the United States from its production and distribution assets. Such plan shall provide that all of said theatre assets, together with other assets which are not production or distribution assets located in the United States, shall be transferred and assigned to one of the new companies, viz., the New Theatre Company, which shall succeed to and receive such assets, and all of said production and distribution assets, together with other assets which are not theatre assets located in the United States, shall be transferred and assigned to the other new company, viz., the New Picture Company, which shall succeed to and receive such assets, and the New Theatre Company shall distribute pro rata to the stockholders of Warner Bros. Pictures, Inc., in exchange for the assets so received by it, its common capital stock, and the New Picture Company shall distribute pro rata to the stockholders of Warner Bros. Pictures, Inc., in exchange for the assets so received by it, its common capital stock, and thereupon Warner Bros. Pictures, Inc., shall be dissolved.

B. The New Picture Company shall not engage in the exhibition business, and the New Theatre Company shall not engage in the distribution business, except that permission to the New Picture Company to engage in the exhibition business or to the New Theatre Company to engage in the distribution business may be granted by the Court upon notice to the Attorney General and upon a showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures.

C. Upon the reorganization provided in this Section VI, Warner Bros. Pictures, Inc., shall cause the New Picture Company to file with the Court its consent to be bound by, and receive the benefits of, the terms of Sections III, VI, VII, VIII, X and XI of this judgment (with respect to Sections VII and VIII in so far as they are applicable to

the New Picture Company), and thereafter the New Picture Company shall be in all respects bound by, and receive the benefits of, the terms of such Sections of this judgment.

D. Upon the reorganization provided in this Section VI, Warner Bros. Pictures, Inc., shall cause the New Theatre Company to file with the Court its consent to be bound by, and receive the benefits of, the terms of Sections IV, V, VI, VII, VIII, X and XI of this judgment (with respect to Sections VII and VIII in so far as they are applicable to the New Theatre Company), and thereafter the New Theatre Company shall be in all respects bound by, and receive the benefits of, the terms of such Sections of this judgment.

[fol. 51]

VII

A. Within a period not to exceed twenty-seven months after the entry of this judgment the New Theatre Company and the New Picture Company shall be operated wholly independently of one another and shall have no common directors, officers, agents or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever. The foregoing provisions shall not be construed to prohibit the directors, officers, agents or employees of the Warner defendants, who become affiliated with either one of said new companies and who receive stock in such companies in exchange for stock presently held by them in Warner Bros. Pictures, Inc., from so acquiring stock in the company with which they do not become affiliated and holding such stock for a sufficient period of time to permit them to sell such stock to persons not affiliated with the seller's company without undue hardship to the seller, provided that in any event such sale shall be made within a period not to exceed one year from the effective date of the reorganization of Warner Bros. Pictures, Inc., and provided further that the provisions of this sentence as to the disposition of stock shall not apply to any agent or employee whose legal or beneficial interest in stock does not exceed one per cent (1%) of the total amount of stock outstanding in the company, and shall not apply to the persons who are subject to the provisions of Section VIII hereunder.

B. The by-laws of the New Theatre Company shall provide that a person affiliated with any other motion picture theatre circuit cannot be elected an officer or a director until he has been approved by the Attorney General and the Court, and that in no event can an officer or a director be affiliated with any motion picture theatre circuit (other than the Warner defendants) which has been [fol. 52] a defendant in an anti-trust suit brought by the Government, relating to the production, distribution or exhibition of motion pictures. The by-laws of the New Picture Company shall provide that a person who is a director, officer, agent, employee or substantial stockholder of another motion picture distribution company cannot be elected an officer or a director.

VIII

Harry M., Albert and Jack L. Warner represent that they now own approximately 18% of the outstanding common stock (excluding treasury stock) of Warner Bros Pictures, Inc. and that certain members of their families, including their wives, now own approximately 6% of such stock. Within twenty-seven months from the date hereof, the said Warners and their families shall either:

A. Dispose of said holdings of the stock of (1) the New Picture Company or (2) the New Theatre Company, as they may elect, to a purchaser who is not a stockholder in the other company, a defendant herein or in an anti-trust suit brought by the Government relating to the production, distribution, or exhibition of motion pictures against whom a judgment has been entered, or owned or controlled by or affiliated with such a defendant or a company resulting from divorcements provided for in judgments entered in Equity Cause No. 87-273, and the said Warners shall use their best efforts so to dispose of said stock; or

B. Deposit with a trustee designated by the Court said holdings of stock of the New Picture Company or the New Theatre Company, as they may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with [fol. 53] respect thereto. Such voting trust agreement shall thereafter remain in force until the said Harry M.

Warner, Albert Warner, Jack L. Warner, and their families shall have sold said holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers as provided in subdivision A above, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms and conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Harry M. Warner, Albert Warner, Jack L. Warner, and their families, shall be entitled to receive all dividends and other distributions made on account of the trustee shares, and proceeds from the sale thereof.

For the purpose of evidencing their consent to be bound by the terms of this Section VIII of this judgment, Harry M. Warner, Albert Warner and Jack L. Warner individually have consented to its entry. The obligations in this Section VIII with respect to the stock in the New Picture Company, or the stock in the New Theatre Company, as the case may be, shall be limited, so far as the families of the said Warners are concerned, to the stock received in exchange for approximately 6% of stock of Warner Bros. Pictures, Inc. mentioned in this Section VIII as owned by certain members of the said families:

The stock disposed of in one company as provided in subdivision A above may not be voted if the holder, otherwise entitled to vote the same, be a person with a legal or beneficial stock interest, or be a corporation with a stock interest directly or through subsidiaries or affiliates, in the other company.

IX

A. Nothing contained in this judgment shall be construed to limit, in any way whatsoever, the right of the Warner defendants, during the period of 12 months from [fol. 54] the date hereof, or until the reorganization provided in Section VI hereof shall have been completed, whichever shall be earlier, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Warner Bros. Pictures, Inc. has or may acquire a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

B. After 12 months from the date hereof, or until the reorganization provided in Section VI hereof shall have been completed, whichever shall be earlier, the provision of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or Warner Bros. Pictures, Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this judgment.

X

A. For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this judgment, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment.

B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which

the United States is a party, or as otherwise required by law.

XI

A. For the purpose of any application under this judgment, the plaintiff and the Warner defendants, hereby waive the necessity of convening a court of three judges pursuant to the expediting certificate filed herein on June 13, 1945; and agree that any application may be determined by any judge sitting in the United States District Court for the Southern District of New York.

Any application by either party under this judgment shall be upon reasonable notice to the other.

B. Jurisdiction of this cause is retained for the purpose of enabling any of the parties and their successors to this consent judgment, and no others, to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or [fol. 56] carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Dated: January 4th, 1951.

AUGUSTUS N. HAND

United States Circuit Judge

HENRY W. GODDARD

United States District Judge

ALFRED C. COXE

United States District Judge

We hereby consent to the entry of the foregoing judgment.

For the Plaintiff

PEYTON FORD

Acting Attorney General

United States Attorney

WM. AMORY UNDERHILL

Acting Asst. Attorney General

PHILIP MARCUS

SIGMUND TIMBERG

Spec. Assts. to Atty. Gen.

Maurice Silverman

HAROLD LASSEN

Trial Attorneys

[fol. 57]

For the Defendants

WARNER BROS. PICTURES INC.

WARNER BROS. PICTURES DISTRIBUTING CORPORATION

WARNER BROS. CIRCUIT MANAGEMENT CORPORATION

By

JOSEPH M. PROSKAUER

ROBERT W. PERKINS

Their Attorneys

We hereby consent to the entry of Section VIII of the above judgment.

HARRY M. WARNER

ALBERT WARNER

JACK L. WARNER

By

STANLEIGH P. FRIEDMAN

Their Attorney

[fol. 58] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, PLAINTIFF,

against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC.,
et al., DEFENDANTS.

SUTPHEN ESTATES, INC., APPLICANT FOR INTERVENTION.

ORDER DENYING MOTION FOR LEAVE TO INTERVENE—
February 26, 1951

Equity No. 87-273

This cause having come on for hearing on the 4th day of January, 1951 on the order to show cause herein dated January 2, 1951 made on the application of Sutphen Estates, Inc., why said Sutphen Estates, Inc. should not be granted leave to intervene in this cause, and this Court having heard argument on said motion prior to the signing on said date of the judgment made herein on the consent thereto of the United States of America, Warner Bros.

Pictures, Inc., Warner Bros. Distributing Corporation, Warner Bros. Circuit Management Corporation, and on the consent to Section VIII thereof by Harry M. Warner, Albert Warner and Jack L. Warner, and having announced at the conclusion of said argument its decision denying said motion, it is

Ordered, that the motion of Sutphen Estates, Inc. for leave to intervene in this cause is denied.

Dated: February 26, 1951

s/ AUGUSTUS N. HAND,
Circuit Judge.

s/ HENRY W. GODDARD,
District Judge.

s/ ALFRED C. COXE,
District Judge.

[fols. 59-60] UNITED STATES DISTRICT COURT

(Title omitted)

ORDER TO SHOW CAUSE ON MOTION TO INTERVENE—
January 2, 1951

On the annexed affidavit of Betram F. Shipman, sworn to the 2nd day of January, 1951; on the annexed Pleading in Intervention on behalf of Sutphen Estates, Inc.; and upon all of the pleadings and other papers filed and all of the proceedings heretofore had herein,

Let the parties affected by said pleading in intervention and their attorneys show cause at a term of this court to be held in Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 4th day of January, 1951, at 4 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein granting leave to said Sutphen Estates, Inc. to intervene in this action in order to assert the claim set forth in the annexed Pleading in Intervention; and

Good cause being shown and sufficient reason appearing therefor, it is

[fol. 61] Ordered, that service of a copy of this order and of said Affidavit and of said Pleading in Intervention on the attorneys for plaintiff The United States of America, and on the attorneys for defendants Warner Bros. Pictures, Inc. Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation on or before 12 o'clock noon of the 3rd day of January, 1951, shall be deemed good and sufficient service thereof.

Dated: New York, N. Y., January 2, 1951

AUGUSTUS N. HAND,

U.S.C.J.

HENRY W. GÖDDARD,

U.S.D.J.

ALFRED C. COXE,

U.S.D.J.

[fol. 62] UNITED STATES DISTRICT COURT

(Title omitted)

AFFIDAVIT

Bertram F. Shipman, being duly sworn, deposes and says:

1. I am a member of the firm of Mudge, Stern, Williams & Tucker, attorneys for Sutphen Estates, Inc., a New York corporation, the Intervener in the annexed Pleading in Intervention, and I am familiar with the matters relating thereto and herein set forth. I make this affidavit in support of an application for an Order to Show Cause directed to the parties in this action affected thereby, namely, plaintiff The United States of America, and defendants Warner Bros. Pictures, Inc. (hereinafter referred to as Warner), Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, granting leave to said Intervener to intervene in this action in order to assert the claim set forth in said Pleading in Intervention.

2. Intervener is the landlord of the very valuable property on the northwest corner of Broadway and 47th Street in the City of New York, New York on which is located

the Strand Theatre. Said property is under lease to Stanley Mark Strand Corporation (hereinafter referred to as [fol. 63] Tenant) for a term of 98 years beginning January 1, 1929, the lease as amended providing, among other things, for an annual rental, currently at the rate of \$300,000 per annum in addition to taxes and other charges payable by Tenant, and including an obligation on the part of Tenant to alter and improve the buildings on the property, to secure which obligation Tenant is required to deposit with Intervener \$100,000 a year for 10 years beginning with December 15, 1948, a total of \$1,000,000 of which \$300,000 has been so deposited to date. All obligations of tenant under the lease are unconditionally guaranteed by defendant Warner which owns approximately 99% of the stock of Stanley Company of America, which owns all of the stock of Tenant.

3. Upon information and belief, a judgment proposed to be consented to herein by plaintiff and Warner, among others, and proposed to be made and entered herein, provides for the transfer of all of the so-called exhibition assets of Warner to a new corporation in exchange for all of its capital stock, the transfer of all other assets of Warner to another new corporation in exchange for all of its capital stock, the distribution pro rata to stockholders of Warner of all of the shares of capital stock of said two new corporations and the dissolution of Warner; and directs that a plan of reorganization providing for such transfers, distribution and dissolution be submitted to stockholders of Warner for approval within 90 days from the date of said proposed consent judgment. Upon information and belief, said proposed consent judgment contains no express provisions preserving or protecting the rights of Intervener with respect to said guaranty by Warner and may contain provisions which may or may not be claimed to limit or restrict Warner in providing adequately for a substitute for its guaranty upon its dissolution.

4. Intervener's motion to intervene in this motion is made under Rule 24 of the Federal Rules of Civil Procedure as Amended, and is based upon the grounds that:

[fol. 64] (a) Intervener is so situated as to be adversely affected by a distribution or other disposition

of property which is in the custody or subject to the control or disposition of this court in connection with said consent judgment;

(b) representation of Intervener's interest by existing parties herein is or may be inadequate and Intervener is or may be bound by said consent judgment; and

(c) Intervener's claim and the main action herein insofar as said consent judgment is involved have questions of law and fact in common;

all as more fully appears from said Pleading in Intervention to which reference is hereby made.

5. I have discussed the claim set forth in said Pleading in Intervention with officers and other representatives of Intervener, and have considered said Lease and the agreements supplemental thereto, including the guaranty agreement of Warner and the agreements supplemental thereto, and on the basis of my investigation I believe and I have advised Intervener that the claim set forth in said Pleading in Intervention is a meritorious claim, and that Intervener should be permitted to intervene in this action in order to assert said claim, and in order that said consent judgment herein or other order made herein shall make adequate provision for the preservation or protection of the rights of Intervener with respect to the guaranty by Warner of the obligations set forth in said Lease as amended, and directing that an equivalent substitute be provided for said guaranty in connection with the transfer of Warner's assets and its dissolution as contemplated in said consent judgment.

[fol. 65] 6. The reason that this application is made by Order to Show Cause rather than by Notice of Motion is that an Order to Show Cause is necessary in order to bring on the Motion to Intervene herein before this court on the 4th day of January, 1951, when said proposed consent judgment is to be presented to this court.

7. No previous or other application has been heretofore made for the relief sought herein.

Wherefore it is respectfully requested that an order be made and entered herein granting leave to Intervener to intervene in this action in order to assert the claim set forth in said Pleading in Intervention, and granting to In-

tervener such other, further and different relief as in the premises may be just, equitable and proper.

BERTRAM F. SHIPMAN

Duly sworn to by Bertram F. Shipman. Jurate omitted in printing.

[fol. 66] UNITED STATES DISTRICT COURT

(Title omitted)

PLEADING IN INTERVENTION—January 2, 1951.

Sutphen Estates, Inc., the Intervener herein, for its Pleading in Intervention alleges as follows:

1. Sutphen Estates, Inc., the Intervener herein, is a corporation, duly organized and existing under the laws of the State of New York, having its principal office at No. 60 East 42nd Street, in the Borough of Manhattan, City, County and State of New York.

2. On or about December 31, 1928, a certain Lease bearing said date (hereinafter called the Lease) was duly made, executed and entered into by ~~and~~ between Intervener as landlord and Stanley Mark Strand Corporation, a New York corporation, as tenant (hereinafter called Tenant). Said lease covers the premises described therein on the northwest corner of Broadway and 47th Street in the City of New York, together with the buildings thereon which include the Strand Theatre. Said Lease is for a full term of approximately 98 years beginning at the date of said [fol. 67] Lease and ending December 31, 2026. By the terms of the Lease the current rental thereunder and until the end of the year 1952, is at the rate of Three Hundred Thousand Dollars (\$300,000) per annum, payable in equal monthly installments in advance on the first day of each and every month. Thereafter and for successive periods of 21, 21, 21 and 11 years, respectively, the annual rental thereunder is to be five per cent (5%) of the appraised value of the land, or the annual rental payable during the last year of the preceding period, whichever is greater, all as determined and as provided in the Lease. Tenant is obligated in addition to pay taxes, water rates, assess-

ments, insurance premiums and other charges assumed by the Tenant and to be paid and discharged by the Tenant, all as in the Lease provided.

3. At all times herein referred to, Tenant has been and is a wholly owned subsidiary of Stanley Corporation of America, and said corporation has been and is a more than 90% owned subsidiary of Warner Bros. Pictures, Inc. (hereinafter called Warner);

4. Among the covenants to be performed by the Tenant under the Lease was a covenant set forth in Article Seventeenth of said Lease whereby Tenant agreed to demolish and remove the buildings upon the leased premises and to erect in place thereof a new Five Million Dollar (\$5,000,000) theatre and office building within six years from January 1, 1929, at a cost and in the manner in the Lease provided.

5. On or about January 5, 1931, said new theatre and office building not having been built or commenced; at the request of Tenant and by an agreement dated January 5, [fol. 68] 1931 between Intervener and Tenant, the time for the erection and completion of such new building was extended to January 1, 1938, and simultaneously by an agreement dated June 5, 1931 between Intervener and Warner, said Warner, for valuable consideration and as an inducement to Intervener to grant such extension, guaranteed the prompt and faithful performance by Tenant of all the terms, covenants and conditions of the Lease as amended. Subsequently, at the requests of Tenant and by agreements between Intervener, Tenant and Warner dated April 4, 1934, April 1, 1937 and October 10, 1941, respectively, the Lease was further amended and supplemented and the time for the erection and completion of said new building was successively extended to January 1, 1953.

6. Subsequently, at the request of Tenant and Warner and by agreement between Intervener, Tenant and Warner dated as of December 15, 1948, Article Seventeenth of the Lease was deleted and a new Article Seventeenth was substituted which among other things provides for the alteration and improvement of the present buildings on the leased premises to modern two story and basement store office and commercial buildings with foundations and construction sufficient to support an eight story fireproof building, at an estimated cost of \$1,000,000 all as elaborately provided

in said agreement. Said agreement of December 15, 1948 provides that Tenant shall pay to Intervener on the 15th day of December, 1948, of the sum of One Hundred Thousand Dollars (\$100,000) and a like sum on the 15th day of December in each year thereafter, to and including the 15th [fol. 69] day of December, 1957, or an aggregate of One Million Dollars (\$1,000,000) and that said amount shall be deposited by Intervener in a separate banking account captioned "Strand Theatre Building Trust Fund" and held by Intervener in trust as security against default of Tenant to alter and improve the buildings as provided in said agreement. In and by said agreement of December 15, 1948, Warner, as guarantor of the performance of the Lease by Tenant, approved and consented to said modification of the Lease, joined in the execution of said agreement of December 15, 1948, and agreed that Warner's said guaranty shall remain in full force and effect and shall include a guaranty of the performance by Tenant of all the obligations imposed upon and assumed by Tenant under the Lease as supplemented, amended and modified as above set forth, including all obligations imposed upon and assumed by Tenant by said agreement of December 15, 1948. Tenant has, to date, made three (3) annual payments into said Fund, totalling Three Hundred Thousand Dollars (\$300,000), the last payment of One Hundred Thousand Dollars (\$100,000) having been made on December 15, 1950.

7. Said Lease as so supplemented, amended and modified, and the guaranty by Warner of the obligations of Tenant thereunder, are and remain in full force and effect, and said guaranty by Warner constitutes a valid, effective and binding obligation of Warner to and for the benefit of Intervener.

8. Upon information and belief, in this action a judgment [fol. 70] is proposed to be consented to by plaintiff and defendant Warner, among others, (hereinafter called Consent Judgment), is to be presented to this Court, whereby, among other things, this Court will decree that a plan of reorganization shall be presented to the stockholders of Warner providing in part that:

- (a) Two new corporations will be formed;
- (b) To one of such new corporations there will be transferred all of the so-called exhibition assets of Warner,

which will include all of the shares of capital stock of Tenant, in exchange for all of the shares of capital stock of said new corporations;

(c) To the other of such new corporations there will be transferred all other assets of Warner in exchange for all of the shares of capital stock of said new corporation;

(d) All of the shares of capital stock of said two new corporations will be distributed pro rata to the stockholders of Warner; and

(e) Warner will thereafter be dissolved.

Upon information and belief, the Consent Judgment will further provide that prior to or at an early date after the transfer of the exhibition assets of Warner to said new corporation a substantial number of theatre properties included among said exhibition assets shall be disposed of.

9. Said proposed plan of reorganization, if adopted and carried out as provided by the Consent Judgment, will [fol. 71] destroy, and deprive Intervener of its valuable rights in, to and under said guaranty of Warner, which is a valid, subsisting obligation, unrelated to any anti-trust violations by Warner or by any other defendant herein, and the destruction of which is unnecessary to full compliance by Warner and the other Warner defendants with the Final Decree of this Court made herein dated February 6, 1950.

10. Upon information and belief, said proposed plan of reorganization as provided in the Consent Judgment is not required by said Final Decree; that said Final Decree, although providing for a divorce of the exhibition business of Warner from its production and distribution business, afforded to Warner wide latitude in the formulation of a plan to comply with such divorce provisions; and that the plan as provided in the Consent Judgment was selected by Warner in preference to numerous other alternatives as most advantageous economically or otherwise to the stockholders of Warner.

11. Upon information and belief the Consent Judgment, although providing for the transfer by Warner of all of its assets and its dissolution, as aforesaid, contains no express provision for the preservation or protection of Intervener's rights in respect of said guaranty obligations of Warner nor for an equivalent substitute for said guaranty obliga-

tions, and no provision for such preservation or protection or for such an equivalent substitute is or will be made in or in connection with said plan of reorganization or the transfer of the assets of Warner or its dissolution.

[fol. 72] 12. Upon information and belief, unless the Consent Judgment or other order or judgment made in this action and/or said plan of reorganization provides for such preservation or protection or for an equivalent substitute for said guaranty obligations of Warner, which should include in any event the joint and several assumption of said guaranty obligations by said two new corporations, said transfer of the assets of Warner and its dissolution after the contemplated distribution to its stockholders, will destroy the valuable rights of Intervener in said guaranty obligations, to the immediate, great and irreparable damage of Intervener, and Intervener will be deprived of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States of America.

13. Upon information and belief, Intervener is entitled to intervene as of right in this action under Rule 24 of the Federal Rules of Civil Procedure as Amended upon the ground that under the circumstances herein set forth Intervener is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of this court by virtue of the Consent Judgment, and upon the further ground that representation of Intervener's interest by existing parties in this action is or may be inadequate and that Intervener is or may be bound by the Consent Judgment.

14. Upon information and belief Intervener is entitled to be permitted to intervene in this action under Rule 24 of the Federal Rules of Civil Procedure as Amended upon the ground that Intervener's claim and the main action herein insofar as the Consent Judgment is involved have questions of law and fact in common.

[fol. 73] 15. Intervener has no adequate remedy save by intervention in this action, to avoid the immediate, great and irreparable damage to it which would result from the making and entry herein of the Consent Judgment without adequate provision being made in the Consent Judgment or

other order of this Court in this action for the preservation or protection of Intervener's valuable rights as hereinabove set forth.

Wherefore, Intervener respectfully prays:

- (a) That Intervener be permitted to intervene in this action for the purpose of asserting the claim herein set forth;
- (b) That this Court refrain from signing the Consent Judgment unless and until the Consent Judgment and the plan of reorganization of Warner provided for therein are amended to assure preservation of said guaranty obligations of Warner or to provide a fully equivalent substitute for such guaranty obligations which shall include an assumption of said guaranty obligations jointly and severally by the two new transferee corporations proposed to be formed;
- (c) In the alternative, that this Court by separate order made herein direct that said guaranty obligations be preserved, or that a fully equivalent substitute therefor be provided which shall include an assumption of said guaranty obligations jointly and severally by the two new transferee corporations proposed to be formed; and
- [fol. 74] (d) That Intervener have such other, further and different relief as in the premises may be just, equitable and proper.

Dated: New York, N. Y., January 2, 1951.

BERTRAM F. SHIPMAN, of
Mudge, Stern, Williams & Tucker,
Attorneys for Intervener,
Office and P. O. Address,
40 Wall Street,
New York 5, N. Y.

[fol 75] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Equity No. 87-273

United States of America, Plaintiff,

against

Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, Defendants

Before Augustus N. Hand, Circuit Judge; Henry W. Goddard and Alfred C. Coxe, District Judges

Herbert A. Bergson, Assistant Attorney General; Robert L. Wright and J. Francis Hayden, Special Assistants to the Attorney General; George H. Davis, Jr., and Harold Lasser, Special Attorneys, for United States of America.

Davis Polk Wardwell Sunderland & Kiendl; J. Robert Rubin, Attorneys for Defendant Loew's, Inc.; John W. Davis, J. Robert Rubin, S. Hazard Gillespie, Jr., and Benjamin Melniker, Counsel.

Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner defendants; Joseph M. Proskauer, Robert W. Perkins, J. Alvin Van Bergh, Howard Levinson, and Harold Berkowitz, Counsel.

James F. Byrnes, Dwight Harris Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; James F. Byrnes, Otto E. Koegel, John F. Caskey, and Frederick W. R. Price, Counsel.

[fol. 76] Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich and Everett A. Frohlich, Counsel.

Charles D. Prutzman, Attorney for the Universal Defendants; Cyril S. Landau, Counsel.

O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery and George A. Raftery, Counsel.

OPINION

Augustus N. Hand, Circuit Judge:

This case comes before us after a decision by the Supreme Court affirming in part and reversing in part our decree and findings of December 31, 1946. *United States v. Paramount Pictures, Inc.*, 334 U. S. 131. Under our findings of fact, we held that there had been violations of Sections 1 and 2 of the Sherman Anti-Trust Act which were summarized in the conclusions of law as follows:

"7. The defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Pictor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Uniiversal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, *** in violation of the Sherman Act by:

"(a) ~~Ag~~quiescing in the establishment of a price fixing system by conspiring with one another to maintain theatre admission prices;

[fol. 77] " (b) Conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform in each local competitive area.

"8. The distributor defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Twentieth Century-Fox Film Corporation; Co-

lumbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, * * * in violation of the Sherman Act by:

"(a) Conspiring with each other to maintain a nationwide system of fixed minimum motion picture theatre admission prices;

"(b) Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices;

"(c) Conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform as to each local competitive area;

"(d) Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in finding No. 110 above;

"(e) Agreeing individually with such licensees to grant unreasonable clearance against theaters operated by their competitors;

"(f) Making master agreements and franchises with such licensees;

[fol. 78]. "(g) Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation;

"(h) The defendants Paramount and RKO making formula deals.

"(9) The exhibitor-defendants, Paramount Pictures, Inc.; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures * * * in violation of the Sherman Act by:

"(a) Jointly operating motion picture theatres with each

other and with independents through operating agreements or profit-sharing leases;

"(b) Jointly owning motion picture theatres with each other and with independents through stock interests in theatre buildings;

"(c) Conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion pictures theatre admission prices, runs, and clearances;

"(d) Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance, and other license terms."

As a remedy for the violations which we have summarized above, we held that a system of competitive bidding for film licenses should be introduced, saying in Finding 85 that:

"Competition can be introduced into the present system [fol. 79] of fixed admission prices, clearances, and runs, by requiring a defendant-distributor when licensing its features to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size, location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license. Thus, price fixing among the licensors or between a licensor and its licensees as well as as the non-competitive clearance system may be terminated."

We also said in Finding 111 that the granting of discriminatory license privileges would be impossible under such a system of competitive bidding as we have mentioned. In addition to providing a system of competitive bidding, we enjoined the unlawful practices above referred to, other than discrimination in granting license, which was sufficiently obviated by the provisions for competitive bidding.

In connection with the foregoing, we denied the application of the plaintiff to divest the major defendants of their theatres on the ground that such a remedy was too harsh and that the system of competitive bidding when coupled with the injunctive relief against the practices we found

to be unlawful was adequate relief, at least until the efficiency of that system had been tried and found wanting. We held that the root of the lack of competition lay not in the ownership of many or most of the best theatres, but in the illegal practices of the defendants, which we believed would be obviated by the remedies we proposed. We examined the theatre holdings of the major defendants, found that they aggregated only about 17% of all theatres in the United States, and held that these defendants by such theatre holdings alone did not collectively or individually have a monopoly of exhibition. While we did not find in [fol. 80] express terms that there was no monopoly in first-run exhibition, we did review the statistics as to the first-run ownership in the 92 largest cities and stated in our opinion of June 11, 1946, that the defendants were not to be viewed collectively in determining the question of monopoly. See 66 F. Supp. 323, 354. We also found no substantial proof that any of the corporate defendants was organized or had been maintained for the purpose of achieving a national monopoly. Finding No. 152. Likewise, even as to localities where one defendant owned all first-run theatres, we found no sufficient proof of purpose to create a monopoly or that the total ownership in such places had not rather arisen from the inertness of competitors, their lack of financial ability to build comparable theatres, or from the preference of the public for the best equipped theatres. Finding No. 153.

In its opinion remanding the case for further consideration in certain respects, the Supreme Court affirmed our findings as to price-fixing, runs, clearances, and discriminatory licenses and other practices which we found to be unlawful, with certain minor reservations as to the unlawfulness of joint interests and franchises. It eliminated, however, the provisions of our decree for competitive bidding "so that a more effective decree may be fashioned," adding by way of caution that: "The competitive bidding system was perhaps the central arch of the decree designed by the District Court. Its elimination may affect the cases in ways other than those which we expressly mention. Hence on remand of the cases the freedom of the District Court to reconsider the adequacy of decree is not limited to those parts we have specifically indicated." [334 U. S.

at p. 166]. It directed our further consideration of monopoly, [fol. 81] divestiture and expansion of theatre holdings, giving as one reason the following: "As we have seen, the District Court considered competitive bidding as an alternative to divestiture in the sense that it concluded that further consideration of divestiture should not be had until competitive bidding had been tried and found wanting. Since we eliminate from the decree the provisions for competitive bidding, it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand." [334 U. S. at p. 175.]

As further reasons for directing a reconsideration of the above issues, we were asked to determine whether the vertical integration of the major defendants, which was held not to be unlawful *per se*, was conceived with an intent to monopolize or was of such a character as to confer a known monopoly power. If the power be established, a specific intent to monopolize need not be shown. As was said by Justice Douglas in *United States v. Griffith*, 334 U. S. 100, 105, and referred to in *United States v. Paramount*, 334 U. S. 131, 173:

"It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. *United States v. Patten*, 226 U. S. 525, 543; *United States v. Masonite Corp.*, 316 U. S. 265, 275. To require a greater showing would cripple the Act. As stated in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act."

[fol. 82] In dealing with the effect of vertical integration upon monopoly, the opinion of the Supreme Court directs us to consider more explicitly than we did in our original opinion whether monopoly exists as to the first-

run theatres throughout the nation, in the 92 largest cities, and in local situations.

It also directs us to determine whether there has been a geographic distribution of theatre ownership among the major defendants. The opinion also says:

"It is clear, so far as the five majors are concerned, that the aim of the conspiracy was exclusionary, i.e. it was designed to strengthen their hold on the exhibition field. In other words, the conspiracy had monopoly in exhibition for one of its goals, as the District Court held. Price, clearance, and run are interdependent. The clearance and run provisions of the licenses fixed the relative playing positions of all theatres in a certain area; the minimum price provisions were based on playing position—the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on. As the District Court found, 'In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible.'

"It is, therefore, not enough in determining the need for divestiture to conclude with the District Court that none of the defendants was organized or has been maintained for the purpose of achieving a 'national monopoly,' nor that the five majors through their present theatre holdings 'alone' do not and cannot collectively or individually have a monopoly of exhibition. For when the starting point is a conspiracy to effect a monopoly through restraints of trade, it is [fol. 83] relevant to determine what the results of the conspiracy were even if they fell short of monopoly."

[334 U. S. at pp. 170-171.]

We were also directed to determine whether any "illegal fruits" were acquired or maintained by the defendants as results of unlawful conspiracies and to divest any such fruits, irrespective of whether monopoly had in fact been achieved. The plaintiff has not introduced evidence to support any claim of divestiture of "illegal fruits" and expressly reserves the presentation of such an issue for the future.

Because of the view of the Supreme Court as to matters to be specially considered on the remand as well as its view regarding other matters which it left open for consideration by this court, it set aside our findings on monopoly and divestiture and our provisions prohibiting further theatre expansion and our provisions for competitive bidding, in order that "the District Court should be allowed to make an entirely fresh start on the whole of the problem."

Although we previously held in Finding No. 154 that the illegalities and restraints were not in the ownership of theatres by the major defendants but in their unlawful practices, this finding was made because of our view that the competitive bidding system, when coupled with injunctions, would terminate the illegalities, and if such illegalities were terminated, the theatre ownerships alone would not be unlawful. This interpretation of our finding is justified by our former conclusion that divestiture should not be tried unless the competitive bidding system was found wanting. In other words, if theatre ownership were regarded as under no circumstances related to violations of the Sherman Act, divestiture could not be a proper remedy and would not have been suggested as a possible alternative in our former opinion.

[fol. 84] Similarly, our Findings 152 and 153 that none of the defendants had been organized or maintained to achieve a national monopoly in production, distribution, or exhibition, or a local monopoly in first-run theatre ownership should be read in the light of the remedy we adopted. The provisions for competitive bidding were thought to have eliminated the conspiracies which had theretofore existed among the defendants in their capacities both as distributors and exhibitors and between defendants and independents; in which the defendants had cooperated and aided one another through certain illegal practices. We accordingly treated the defendants as no longer able to engage in illegal practices and the public sufficiently safeguarded by the requirement of competitive bidding and the injunctions against such practices. These safeguards we thought applied to the national market as well as to local situations. Our conclusion of law that the defendants had attempted to monopolize was correct as

to their prior acts, unaffected by our decree. And so the Supreme Court understood us to mean when it said: "In other words, the conspiracy had monopoly in exhibition for one of its goals, as the District Court held." [334 U. S. at p. 170]. With the elimination of competitive bidding, as we shall see from our future discussion, our Findings numbered 152 and 153 would not be justified, and should be vacated.

A review of the illegalities which we, and the Supreme Court as well, have found, to exist, in addition to a consideration of geographical distribution and very general absence of competition between the major defendants, convinces us that in the absence of a system of competitive bidding, the theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Anti-Trust Act.

[fol. 85] We have held that all of the defendants fixed substantially the same price for each theatre in which they licensed their films. This system was general and affected most of the theatres in the United States. We likewise held that the system restricted competition between the theatres of the major defendants and those of independents. The system also plainly restricted competition between the theatres of the major defendants in those areas where such theatres were in competition with one another, since the minimum price to be charged by any theatre licensee was fixed and the licensee was prevented from competing in the business of exhibition by lowering his price. That these restrictions on competition were one of the primary objectives of the price-fixing conspiracy was noted in our former opinion, where we said that:

"* * * all of the five major defendants had a definite interest in keeping up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to independent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood." (66 F. Supp. 335-6.)

In discussing the foregoing practices, Mr. Justice Douglas said in his opinion:

"The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants; a vertical one between each distributor-defendant and its licensees. The latter was based on express agreements and was plainly established. The [fol. 86] former was inferred from the pattern of price-fixing disclosed in the record. We think there was adequate foundation for it too. It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. *Interstate Circuit v. United States*, 306 U. S. 226-227; *United States v. Masonite Corp.*, 316 U. S. 265, 275. That was shown here." (334 U. S. at p. 142.)

It seems obvious from the foregoing that complete freedom from price competition among theatre holders could only be obtained if prices were fixed by all distributors, and such a result was substantially obtained. Consequently, the system of theatre licensing had a vital and all-pervasive effect in restricting competition for theatre patronage.

In our Finding 72 we held that: "The differentials in admission price set by a distributor in licensing a particular feature in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres" and thus the distributor "attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible." This policy not only benefitted the distributors in securing to them a maximum rental income from their films, but also benefited the major defendants as exhibitors, since they were by far the largest owners of first-run theatres in the country.

The fixed system of runs and clearances which we found involved a cooperative arrangement among the defendants, was also designed to protect their theatre holdings and safeguard the revenue therefrom. Like the system of fixed prices, it could only succeed in eliminating competi-

tion if the defendants generally cooperated in maintaining [fol. 87] it, as we have held they did. The major defendants' predominant position in first-run theatre holdings was strongly protected by a fixed system of clearances and runs. As we said in our former opinion:

"The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained." (66 F. Supp. at p. 346.)

Our view was confirmed by Mr. Justice Douglas as follows:

"Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor defendants and with other favored exhibitors." (334 U. S. 131, 148.)

While we pointed out in our former opinion that there was discrimination in clearance and run by distributors and theatre holders in particular instances, such as Goldman Theatres v. Loew's, 150 F. 2d 738 (C.A. 3), and Bigelow v. RKO Radio Pictures, Inc., 150 F. 2d 877 (C.A. 7), reversed on other grounds, 327 U. S. 251, we concluded that we could not say upon the facts before us that this discrimination was general. Nevertheless, as already stated, we held that the defendants had set up a [fol. 88] system of fixed runs and clearances which prevented any effective competition by outsiders. This system, in the absence of competitive bidding which has now been rejected, gave the defendants a practical control over the run and clearance status of any given theatre and irrespective of the extent of local discriminations violated

the Sherman Act. It involved discrimination against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or improving theatres while the major defendants possessed superior advantages. Therefore, though the evidence was insufficient to convince us that there was discrimination in negotiation for clearances and runs theatre by theatre, because it was well-nigh impossible to establish that a particular clearance or run was not refused because of the inadequacy of the applicant's theatre, the system of clearances and runs was such as to make competition against the defendants practically impossible.

As we have held, the licensing agreements in use by the defendants discriminated against small independents in favor of the larger circuits of affiliated and unaffiliated theatres. This discrimination was effected through formula deals and certain privileges frequently granted to large circuits in franchises and master agreements. They not only showed discrimination against small theatre owners, but in many instances also showed cooperation among the major defendants in their respective capacities as distributors and exhibitors. The minor defendants as distributors acceded to and cooperated with these restrictions, which excluded small independents.

Formula deals and certain master agreements, both of which involved licenses to more than one theatre, and [fol. 89] frequently to affiliated or large independent circuits, permitted the exhibitor to allocate film rental and playing time and thus precluded other theatre owners from the opportunity of competing for films theatre by theatre. While the Supreme Court has said that franchises are not necessarily objectionable *per se*, the defendants in various instances coupled their franchises with contract provisions which were not included in the standard forms of contract under which small independents were licensed. These provisions, which at times conferred great competitive advantages upon those receiving them, were:

"Suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening; allowing large privileges in the selection and

elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers and extended runs; granting road show privileges; allowing overage and underage; granting unlimited playing time; excluding foreign pictures and those of independent producers; granting rights to question the classification of features for rental purposes." (Finding 110.)

We have been instructed by the Supreme Court to consider the question of geographical distribution of theatres among the five major defendants. In dealing with this subject, we do not take into account the presence or absence of independent theatres in the areas dealt with. We have examined the defendants' theatre holdings and find that in cities of less than 100,000 in population, there is no doubt that Paramount, Warner, Fox and RKO owned or operated theatres either in largely separate market areas or in pools, without more than trifling competition among themselves or with Loew's. In cities having a [fol. 90] population of more than 100,000, there was in general little competition among the defendants, although considerably more than in towns of under 100,000. A summary of the data which substantially represents the true situation, but owing to certain differences in the proofs offered must be regarded as approximate rather than as entirely accurate, is as follows:

Cities of Less Than 100,000

In cities of less than 100,000, Paramount had complete or partial interests in or pooling agreements* with other defendants affecting 1,236 theatres located in 494 towns. In 13 of these towns containing 31 of the theatres—or only 3%—there was competition with another defendant. In 9% of these towns competition between Paramount and the only other defendant in the town was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres; and in this 9%

* Pooling agreements and joint interests among defendants are treated as indistinguishable for the purpose of summarizing geographical distribution.

were located 10% of Paramount's theatre interests. And in 88% of the towns, containing 87% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus it appears that there was little, if any, competition between Paramount and any other defendant in 97% of the towns of under 100,000 and in respect to 97% of the theatres in which Paramount had an interest.

Fox had similar theatre interests in 428 theatres located in 177 towns. In 13 of these towns containing 29 Fox theatres, or about 7% thereof, there was competition with another defendant. In about 93% of the towns containing the same percentage of Fox's theatre interests, Fox was the only defendant operating theatres.

Warner had similar theatre interests in 306 theatres located in 155 towns of less than 100,000. In 17 towns, or 11%, containing 30 Warner theatres, or 10% of its holdings, there was competition with another major defendant. In 3% of the towns, competition between Warner and the only other defendant in the town was substantially lessened or eliminated by means of pooling agreements; and in this 3% were located 4% of Warner's theatre interests. In 86% of the towns containing the same percentage of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, there appears to have been little, if any, competition between Warner and any other defendant in 89% of the towns and in respect to 90% of the theatres in which Warner had an interest.

Loew had interests in only 17 theatres located in 14 towns. In 4 towns, or 29%, containing 4 Loew theatres, or 23%, there was competition with another defendant. In 14% of the towns, competition was substantially lessened or eliminated by means of pooling agreements; and in this 14% were located 18% of Loew's theatre interests. In 57% of the towns, containing 59% of Loew's theatre interests, Loew was the only defendant operating theatres. Thus, there appears to have been little, if any, competition between Loew and any other defendant in 71% of the towns and in respect to 77% of the theatres in which Loew had an interest. It is to be noted, however, that Loew's theatre interests in towns of less than 100,000

constitute a far smaller proportion of its total theatre holdings than do those of the other defendants.

RKO had interests in 150 theatres located in 66 towns. In 6 towns, or 10%, containing 6 RKO theatres, or 4%, there was competition with another major defendant. In 60% of the towns, competition was substantially lessened or eliminated by means of pooling agreements, and in this 60% were located 73% of RKO's theatre interests. In 30% of the towns, containing 23% of RKO's theatre interests, RKO was the only defendant operating theatres. [fol. 92] Thus, there appears to have been little, if any, competition between RKO and any other defendant in 90% of the towns and in respect to 96% of the theatres in which RKO had an interest.

As a further illustration of the absence of substantial competition among the five major defendants in towns of less than 100,000 population, the proofs as to their total theatre holdings make the following showing which seems to us impressive. They had interests altogether in 2,020 theatres located in 834 towns. In 26 towns, or 3%, containing 100 of their theatres, or 5%, there was competition among some of them. In somewhat over 5% of the towns, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 5% were located 7% of their theatre interests. And in somewhat less than 92% of the towns, containing 88% of their theatre interests, only one of the major defendants owned theatres in the area. Thus, there appears to have been little, if any, competition among the five defendants or any of them in 97% of the towns and in respect to 95% of the theatres in which they had an interest.

It appears from the foregoing that the effect of the geographical distribution in towns having population of less than 100,000 was largely to eliminate competition among all of the defendants in the areas where any of them had theatres. The details upon which our results have been based appear in the statistical data set forth at the end of the opinion in Appendix 1.

Cities of 100,000 and Over

In cities of over 100,000 Paramount had complete or partial interests in or pooling agreements with other defendants affecting 352 theatres in 49 cities. In 18 of these cities, or 37%, containing 91 Paramount theatres, or [fol. 93] 26%, there was competition with other defendants. In an additional 10% of the cities, containing 17% of Paramount's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Paramount, both on first and later runs, that competition with Paramount was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 12% of these cities competition between Paramount and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some, or all of their theatres, and in this 12% were located 18% of Paramount's theatre interests. And in 41% of the cities, containing 39% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Paramount and any other defendant in 63% of the cities of over 100,000 and in respect to 74% of the theatres in which Paramount had an interest.

Fox had similar theatre interests in 211 theatres located in 17 cities. In 5 of these cities, or 29%, containing 54 Fox theatres, or 26%, there was competition with other defendants. In an additional 18% of the cities, containing 41% of Fox's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Fox, both on first and later runs, that competition with Fox was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 53% of the cities, containing 33% of Fox's theatre interests, Fox was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Fox and any other defendant in 71% of the cities and in respect to 74% of the theatres in which Fox had an interest.

[fol. 94] Warner has similar theatre interests in 243 theatres located in 26 cities. In 14 of those cities, or 54%, containing 89 theatres; or 37%, there was competition with

other defendants. In an additional 8% of the cities, containing 5% of Warner's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Warner, both on first and later runs, that competition with Warner was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 19% of these cities competition between Warner and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 19% were located 51% of Warner's theatre interests. And in 19% of the cities, containing 7% of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Warner and any other defendant in 46% of the cities and in respect to 63% of the theatres in which Warner had an interest.

Loew had similar theatre interests in 144 theatres located in 37 cities. In 32 of those cities, or 86%, containing 122 Loew theatres, or 85%, there was competition with other defendants. In 3% of these cities, competition between Loew and the only other defendant in the city was eliminated by means of a pooling agreement affecting all of their theatres, and in this 3% were located 7% of Loew's theatre interests. And in 11% of the cities, containing 8% of Loew's theatre interests, Loew was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Loew and any other defendant in 14% of the cities and in respect to 15% of the theatres in which Loew had an interest. In the matter of mere geographical distribution of its theatres, Loew has the most favorable record of any of the major defendants. [fol. 95] But it is to be noted that, while it is true that as to its neighborhood prior run theatres in New York, there was competition with RKO in the sense that both operated in New York on the same runs, nevertheless these two companies divided the product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. Indeed, on one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood cir-

cuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, we think that the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done, it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000.

RKO had similar theatre interests in 256 theatres in 31 cities. In 22 of these cities, or 72%, containing 190 theatres, or 74%, there was competition with other defendants. In an additional 6% of the cities, containing 4% of RKO's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with RKO, both on first and later runs, that competition with RKO was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 16% [fol. 96] of these cities, competition between RKO and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 16% were located 15% of RKO's theatre interests. And in 6% of the cities, containing 7% of RKO's theatre interests, RKO was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between RKO and other defendants in 28% of the cities and in respect to 26% of the theatres in which RKO had an interest. With respect to mere geographical distribution, RKO's record was relatively good but it is to be noted that approximately 58% of its theatre interests were located in New York on neighborhood runs, and the same comments as to distribution of film made in regard to Loew's are applicable to RKO. If its New York neighborhood theatre interests were excluded from the category of theatres in competition with other defendants, the RKO percentage would

then be only about 16% in competition with other defendants.

The major defendants had interests altogether in 1,112 theatres located in 87 cities of more than 100,000. In 46% of these cities, containing 23% of their theatre interests, only one of the major defendants owned theatres in the area. In 11.5% of the cities, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 11.5% were located 16% of their theatre holdings. In an additional 11.5% of the cities, containing 17% of their theatre interests, there was more than one defendant having theatre interests in the city, but the position of one defendant was so dominant relative to the others that competition between them was unsubstantial. In 31% of the cities, containing 44% of their theatre interests, there was competition among the [fol. 97] defendants. But the New York neighborhood theatres of Loew and RKO, which are included in reaching the 44% figure, should properly be excluded because there is no competition between Loew and RKO in obtaining pictures for the reasons we have already given. This would reduce the percentage of defendants' theatres which compete with one another to 27.

It appears from the foregoing that the effect of the geographical distribution in cities having a population of more than 100,000 was substantially to limit competition among the major defendants. The details upon which our results have been based appear in the statistical data set forth at the end of the opinion in Appendix 2.

The statistics contained in both Appendix 1 and Appendix 2 are derived from data submitted at the original trial and show the situation in 1945. Since the entry of our original decree, these figures have not been substantially changed as to towns of under 100,000, but have been somewhat changed, principally by the dissolution of pools pursuant to our decree, in the case of cities of more than 100,000. The situation in 1945, however, would seem to be far more important in determining whether violations of the Sherman Anti-Trust Act occurred than the status existing after the defendants had been found guilty of wrongs and were merely taking steps to carry out our remedial decree. For this reason, we have included statis-

ties relating to the conduct of Paramount and RKO, even though the remedies against them are now provided under consent decrees.

The plaintiff contends that the figures as to geographical distribution require a finding that there was an agreement to divide territory, but the evidence indicates that much of the acquisition of theatres was due to the buying up of circuits and that the purchases at least in some of these [fol. 98] cases involved competition among certain of the defendants. We, therefore, do not find an agreement to divide territory geographically in the organization of the defendants' theatre circuits, but we do hold that the geographical distribution became a part of a system in which competition was largely absent and the status of which was maintained by fixed runs, clearance and prices, by pooling agreements and joint ownerships among the major defendants, and by cross-licensing which made it necessary that they should work together. The argument of some of the defendants that they had no opportunity to change this geographical status not only seems inherently improbable but affirmatively contradicted by the making of pooling agreements and entering into joint ownerships with one another. Moreover, even in the relatively few areas where more than one of the major defendants had theatres, competition for first-run licensing privileges was generally absent because the defendants customarily adhered to a set method in the distribution and playing of their films. In substantiation of the general picture, the plaintiff has shown, on the basis of a study of four seasons between the years 1936 and 1944, that during this period the privilege of first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool or an arbitrary division of the product known as a "split". The lack of competition which we have described has undoubtedly been induced in large measure by the reliance of the defendants on each other in obtaining pictures for use in their various theatres throughout the country. The defendants were also dependent on one another to obtain theatre outlets for their own pictures, for the best customers of any defendant were ordinarily one or more of the other defendants.

[fol. 99] We think that there can hardly be adequate competition among the defendants where such interdependence exists. Moreover, when the defendants were interdependent as to a great part of their activities, it necessarily would affect not only competition among themselves, but with independents. We have already found such effects in the various concerted practices of the defendants which have restricted competition with independents. In our former opinion, we provided for a system of competitive bidding for film in the belief that such a system would sufficiently control the reliance of the major defendants on one another's product and theatres. That system having been rejected by the Supreme Court, we must find some other means of preventing the major companies from being in a state of interdependence which too greatly restricts competition.

One of the chief matters referred to us by the Supreme Court is the effect of vertical integration upon competition in the industry. While vertical integration would not *per se* violate the Sherman Act, the Supreme Court has made it clear that if such integration is conceived with a specific intent to control the market or creates a power to control the market which is accompanied by an intent to exercise the power, the integration becomes illegal.

We are not satisfied that the plaintiff has shown a calculated scheme to control the market in the conception of the defendants' vertical integration, rather than a purpose to obtain an outlet for their pictures and a supply of film for their theatres. But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each [fol. 100] of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however, innocent they might be in other situations. We do not suggest that every vertically integrated company which engages in restraints of trade or conspiracies will thereby render its vertical integration illegal. The test is whether there is a close relationship between the vertical integration and the illegal practices. Here the vertical integrations were a definite means of carrying

out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act, a conclusion which requires the elimination of our Findings 152 and 153, as explained above.

In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. There was a horizontal conspiracy as to price-fixing, runs and clearances. The vertical integrations aided such a conspiracy at every point. In these circumstances, the defendants must be viewed collectively rather than independently as to the power which they exercised over the market by their theatre holdings. See American Tobacco Co. v. United States, 328 U.S. 781. The statement in our former opinion that the defendants were to be treated individually is subject to our comments in dealing with Findings 152, 153 and 154. We were then proposing to set up a bidding system which was thought adequately to restore competition and, therefore, to render a treatment of the defendants in the aggregate as irrelevant. We regard such treatment as now necessary.

[fol. 101] If viewed collectively, the major defendants owned in 1945 at least 70% of the first-run theatres in the 92 largest cities, and the Supreme Court has noted that they owned 60% of the first-run theatres in cities with populations between 25,000 and 100,000. As distributors, they received approximately 73% of the domestic film rental from the films, except Westerns, distributed in the 1943-44 season. These figures certainly indicate, when coupled with the strategic advantages of vertical integration, a power to exclude competition from these markets when desired. This power might be exercised either against non-affiliated exhibitors or distributors, for the ownership of what was generally the best first-run theatres, coupled with the possession by the defendants of the best pictures, enable them substantially to control the market. If an intent to exercise the power be thought important, it existed in this case, as we noted above in finding an attempt to monopolize. Our former Finding No. 119 was not made in consideration of first-run theatres

but was based on total theatre holdings in the country, of which the theatres owned by the defendants represented but a small fraction. We, therefore, did not take into consideration the monopoly power in respect to first-run theatres, which we have since been directed to consider. Accordingly, our Finding No. 119 is in view of our further consideration misleading and must be vacated.

We may add that what we have said about the power to exclude independents from first-runs in the 92 cities is supported by evidence of actual exclusion which is presented in the Government's original brief, pages 13-14 and 35-40. In many cities, there was complete exclusion of independents and in numerous others a restricted distribution [fol. 102] of pictures to independents, at times by only one of the defendants, and at other times by most limited percentages of pictures as compared with the number distributed to affiliated theatres. The facts as to film distribution in the 1943-44 season show that the five major defendants achieved a monopoly of first-run exhibition of the feature films distributed by the five major defendants in about 43 of the 92 cities of over 100,000 and of the feature films distributed by the eight defendants in about 143 of the 320 cities of 25,000 to 100,000. [See Government Exhibits 489, 490, 490(a).] In addition to the proof of monopoly control in cities of more than 25,000 the plaintiff has produced proof that in approximately 238 towns involving in all but about 17 cases populations of less than 25,000 but having two or more theatres, some single one of the five major defendants, or in about 18 cases two of the defendants, had all the theatres and therefore possessed a complete local monopoly in exhibition (See Government Exhibit 488). These figures are subject to some qualifications because of inaccuracy as to a few localities, but for the most part they appear to be correct and to show either total absence of competition or slight competition from drive-ins and theatres in nearby communities. They afford significant additional proof of monopoly control. Accordingly, there was not only the power to exclude which might be exercised at will but an actual exclusion approximating in the aggregate 70% of the first-run theatre market in the 92 largest cities. This percentage is based on the proportions of theatre ownership of the major defendants in

these cities as compared with independents. There is certainly no reason to suppose that at least as great a percentage would not exist in favor of the major defendants in the number of feature films distributed on first-run.

Furthermore, the power to fix clearances and runs which we have found existed and was exercised by the major defendants was in itself a power to exclude independents who were competitors, and was accompanied by actual exclusion.

The Remedy

The Supreme Court has denied the remedy of requiring the defendants to offer films to the highest bidder and has required us to find some other means of obviating the illegal practices and attempted monopoly on the part of the defendants. The latter argue that the injunction issued in our prior decree, supplemented by a prohibition of discrimination against small independents and an adequate arbitration system, would afford a sufficient remedy. Mr. Justice Douglas has in this very case pointed out the inadequacies of an injunction to deal with situations much like the present. In discussing the objections to competitive bidding, he alluded to the fact that the determination of what was the best bid in a given case would depend on a comparison of the theatres and theatre operators desiring a picture, rentals offered, which might be a flat rental for one theatre and a percentage rental for another, and the relative value in respect to the various offers of the clearances and runs proposed. He said: "It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearances, length of run, competitive areas, reasonable return, and the like." (United States v. Paramount Pictures, Inc., 334 U. S. 131, 163.) Practically all of the same objections would exist if an injunction should be relied on as the only remedy for the abuses which have been found to exist in the case at bar. The effect of such a solution would be to leave the determination of difficult comparisons to the discretion of the very parties who have frequently abused that discretion in the past, or to a detailed supervision by the courts, the burden of which would only be ameliorated by a system of arbitration if and in so far

as particular independents having grievances might be willing to adopt it. If we had regarded an injunction as a sufficient remedy, we would not have required a competitive bidding for films in our original opinion.

In *United States v. Crescent Amusement Co.*, 323 U. S. 173, 189-190, Mr. Justice Douglas, in discussing the inadequacy of injunctions and the propriety of divestiture to prevent violations of the Sherman Act, said:

"The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. Hence we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available."

In the *Crescent* case, the court accordingly affirmed an order of divestiture of stock held by the defendant companies to terminate affiliations and prevent further violations of the Act.

[fol. 105] As an injunction is regarded as an insufficient remedy there must, in our opinion, be a divorce or separation of the business of the defendants as exhibitors of films from their business as producers and distributors. Just as in the *Crescent* case affiliation was held to furnish the incentive for carrying out the conspiracy that there existed; we find that vertical integration has served a similar purpose in the case at bar.

It is argued that the monopoly power which we have found existed in 1945 as to first-run theatres in the 92 largest cities has ceased to exist and that monopolies in particular localities have been substantially lessened in

respect to Loew, Warner, and Fox; by the consent decrees recently entered against Paramount and RKO, by the dissolution of pools and joint interests which has taken place or will take place pursuant to our decree and by changes in distribution practices. Assuming that this is so, nevertheless, we have found that a conspiracy has been maintained through price-fixing, runs and clearances, induced by vertical integration, and that this conspiracy resulted in the exercise of monopoly power. The necessity of terminating such a conspiracy by the three defendants which have not subjected themselves to a consent decree would be unaffected by the present existence or non-existence of a monopoly on their part in first-runs, for the conspiracy is illegal even though the participants may have ceased at least for the time to possess monopoly power. Moreover, the monopoly power might be built up again if the illegal practices were not terminated by divorcement, irrespective of the fact that two of the conspirators have been eliminated from the conspiracy by the consent decrees. Therefore, the divorcement we have determined to order appears to be the only adequate means of terminating the conspiracy and preventing any resurgence of monopoly [fol. 106] power on the part of the remaining defendants. Beyond all the above considerations there would seem to be an inherent injustice in allowing defendants to avoid divorcement when they would have been originally subjected to it merely because two of their confederates eliminated themselves from a compulsory decree which would have been based upon the participation of all in the conspiracy.

The defendants further contend that they have changed their distribution practices by arranging for many runs and clearances which are more equitable than before, and that they no longer have any participation in fixing the prices to be charged by a theatre licensee, which are now wholly controlled by the licensees. But the temptation to continue such practices will still be strong, and we cannot regard an injunction as a sufficient preventive for the reasons already stated. Likewise, we cannot know whether the new distribution practices comply with the injunctive provisions of our former decree and do not feel justified in leaving defendants found to be participants heretofore

in improper practices free to continue them except for the inadequate injunctive provisions.

We have already held that our Findings 119, 152, 153 and 154 should be vacated. We also hold that Findings 155 and 156 should be vacated as they are incorrect or misleading in view of the elimination as a remedy of competitive bidding and our decision that injunctive relief alone is an insufficient remedy.

The plaintiff asks to have Finding 100 vacated and suggests a substitute. We hold that Finding 100 should be vacated because it is somewhat obscure in its scope and implications, but we do not find sufficient reason for adopting the proposed substitute, which seems to us to be irrelevant to the issues involved.

[fol. 107] Since the Supreme Court has eliminated any system of competitive bidding, our Findings 85 and 111 should likewise be vacated.

Joint Interests

The Supreme Court has asked us to reconsider the dissolution of joint interests between defendants and independents because some partial interests of independents were said to have been held by investors rather than actual or potential exhibitors. Paramount and RKO need not be considered, since they are now subject to the provisions of consent decrees. Fox has obtained an order, agreed to by the plaintiff, dealing with the disposition of all its joint interests, except its partial ownership through its affiliate National Theatres Corporation in Evergreen State Amusement Corporation. Fox contends that evidence offered at the trial after reⁿhand shows that one Newman, who had an indirect interest of about 15% in Evergreen, was not an actual or potential theatre operator. He became the president and manager of Evergreen, but that in itself did not make him a co-owner with Fox in that company, and his interest of about 15% seems to us no more than the interest of an investor. Nor do we find any indication that he would have been an independent operator of a theatre but for his investment in Evergreen. Prior to the investment he had been an employee of National and for some seven years had had no ownership in a theatre. In the circumstances, we hold that the interest of Fox in

Evergreen need not be dissolved, although it will be subject to a general divorce~~ment~~ like the other theatre holdings of Fox from its distribution business.

In respect to Warner, the plaintiff has consented to an order disposing of all its joint interests. In the case of Loew, the plaintiff has agreed to an order disposing of its joint interest in Buffalo Theatres, Inc., and seems to have [fol. 108] approved a stipulation made in open court providing for the disposition of all its other joint interests.

In our opinion the orders and stipulations relating to joint ownerships of Fox, Warner and Loew with independents are sufficient to dispose of all questions arising under the requirement of the Supreme Court that joint interests with actual or potential operators be dissolved. In view of the situation presented by the making of these orders and stipulations, our Findings 115, 116, and 117 should be vacated, and the proposed substituted findings of the plaintiff should be denied.

Franchises

We are directed by the Supreme Court to reconsider our prior decision prohibiting franchises in all cases, and as an initial step conforming to the Supreme Court's opinion our Finding 89 should be vacated. On reconsideration, we adhere to the view that the three remaining major defendants as well as the three minor defendants should not be allowed to grant franchises except to independents. Such a practice ties up the distribution of films and restricts competition by independents to obtain pictures for what we regard as unnecessarily long periods and has been a method of unlawful discrimination in the past. We hold, however, that any of the defendants may grant franchises to an independent operator, provided that the result thereof will be to enable such independent to compete effectively with theatres affiliated with a defendant or with theatres in the new theatre circuits to be formed pursuant to our order of divorce~~ment~~. We see no objection to the substituted Finding 89 proposed by the plaintiff and adopt it accordingly.

Clearance

Our disposition of clearances was in no way altered by [fol. 109] the Supreme Court. We think, however, that

our Finding 77 was inadvertent and should be modified so as to read as follows, thus conforming to paragraph 4 in Section II of our decree based upon the finding:

"A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public."

The substitute for Finding 78 proposed by the plaintiff is denied.

Discrimination

The plaintiff requests cancellation of paragraphs 8 and 9 in Section II of our former decree, which include provisions as to discrimination, and wishes to substitute a flat prohibition against including in licenses made with affiliate exhibitors or circuits of theatres certain contract provisions by which discriminations against small independents and in favor of the large affiliated and unaffiliated circuits were accomplished, as this court stated in Finding 110, affirmed by the Supreme Court. These provisions would only be illegal if inherently discriminatory or used in a discriminatory manner. We think it sufficient to provide, as was done in the Paramount consent decree, that the distributor defendants be enjoined "from licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres, or others." It may be objected that this is competitive bidding which has been rejected by the Supreme Court, but it neither involves calling for bids nor licensing [fol. 110] picture by picture. A group of pictures may be licensed to one who wishes to take them without conditions being imposed that he can obtain one only if he purchases the group. We hold that the request of the plaintiff for the cancellation of paragraph 8 of Section II of the decree should be granted, but paragraph 9 should stand as it is. A new paragraph corresponding with the one we have quoted above from the Paramount consent decree should be substituted for the cancelled paragraph 8.

The Three Minor Defendants

We can see nothing in the arguments on behalf of these defendants for special treatment except an attempt to revise some of our former findings of fact and conclusions of law which have been affirmed by the Supreme Court. We have already dealt with the questions of franchises and discrimination earlier in this opinion. In respect to road shows, we see no reason for exempting them from the various injunctive provisions of our decree. It is entirely possible for the licensor to license for road shows, so long as it is not done in a discriminatory manner, either at a flat rental or on the basis of some percentage of what the show is thought likely to yield. But it would be unlawful in this, as in the case of other licenses, for the licensor to require a fixed admission price as a condition of the license.

The three minor defendants argue that they should be allowed to retain their old customers irrespective of discrimination and contend that the Supreme Court has indicated that they possess this right. We cannot so interpret the opinion of the Supreme Court. It only presented the argument that, if competitive bidding had been sanctioned, the three minor defendants would lose the relationships they had with old customers and would be at a disadvantage in competing with the more powerful major defendants [fol. 111] whose own theatres were not subject to competitive bidding. The system of preferring old customers undoubtedly aided discrimination in the past and served as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful. When separation of the business of distribution from that of the operation of theatres is affected, there will be a favorable market for the three minor defendants in which to license their pictures. This will be not only a compensation for inability to prefer their old customers but apparently a substantial added advantage to them in obtaining a greater opportunity to license their pictures than they had heretofore.

The Decree

The Supreme Court has asked us to divest any theatres which may be fruits of past illegal restraints or conspiracies. It may appear also to be necessary, irrespective of

our general plan of divorceement, to terminate theatre monopolies in certain local situations possessed by any individual defendant or by any new theatre circuit which may be set up under the divorceement decree we propose. The plaintiff has presented insufficient evidence to justify us in disestablishing particular theatres either on the theory of local monopolies or of illegal fruits, and indeed it has formally stated that evidence of illegal fruits is not now available. So far as local monopolies are concerned, the statistics presented by the plaintiff were furnished to support the need for a general divorceement which this opinion has sanctioned and did not precisely reach any situations of local monopoly which may require divestiture of specific theatres. Moreover, certain of the statistics presented by the plaintiff go no farther than the year 1945, and there have been various changes in theatre holdings since that date. Accordingly, consideration of fruits and local monopolies will be suspended in the decree which we shall presently make.

[fol. 112] In accordance with the instructions of the Supreme Court it is necessary that the provisions of paragraph 6 in Section III of our former decree in respect to expansion of theatre holdings be vacated. A provision should be substituted in the decree to be entered which enjoins the three exhibitor-defendants and any theatre-holding corporation resulting from the divorceement we propose from acquiring a beneficial interest in any additional theatre unless the acquiring exhibitor-defendant or corporation shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

It is argued by the plaintiff that a limited prohibition of cross-licensing of pictures among the three major defendants should be adopted temporarily. We think such a limitation would be unwarrantedly injurious both to those defendants and to the public. The plaintiff proposes that each major defendant be enjoined from licensing more than half of its films to any of the other defendants pending the completion of divorceement plans in those towns where the plaintiff claims there are no independent theatres or at least no independent first-run theatres. The plaintiff evidently hopes that such a limitation would induce inde-

pends to acquire theatres in so-called closed towns. Unless and until that should happen, one or two of the major defendants might be unable to show more than half of their pictures in such towns, and if but one of the major defendants had theatres there, those theatres could show only half of the films of the other two. It is manifest that this limitation upon cross-licensing would injure both the major defendants and the public, who would be deprived of [fol. 113] seeing some of the pictures. In addition to this, the selection of the particular pictures in the half which could be licensed would involve some difficulties and might prove in the end to have been unwise, both for the distributor involved and the public interest. Our remedy of divorce-ment will meet all of the purposes for which the plaintiff is striving. We do not think that its completion will be so delayed as to justify this doubtful and difficult ad interim remedy proposed by the plaintiff.

The arbitration system and the Appeal Board which has been a part of it have been useful in the past and as we understand it have met with the general approval of the plaintiff and of those defendants who have agreed to it. In our opinion it has saved much litigation in the courts and it should be continued. Accordingly, the three major distributor-defendants and any others who are willing to file with the American Arbitration Association their consent to abide by the rules of arbitration and to perform the awards of arbitrators, should be authorized to set up an arbitration system with an accompanying Appeal Board, which will become effective as soon as it may be organized after the decree to be entered in this action shall be made, upon terms to be settled by the court upon notice to the parties to this action.

The decree herein should be settled on notice and should be in accord with what we have said in the foregoing opinion. The terms as to divorce-ment set forth in the plaintiff's proposed decree seem to us satisfactory, except that the reference to paragraph 10 in Section III, relating to joint interests, which we have rejected, should be deleted. We also approve of the further proposal of the plaintiff that the plaintiff and the defendants shall submit plans calling for such divestiture of theatres as may comply with [fol. 114] the requirements of the Supreme Court regarding local monopolies and illegal fruits. Any ultimate dis-

position, however, must await a later order which shall be dependent upon the proof the plaintiff may furnish as to local monopolies and illegal fruits. We may perhaps indulge in the hope that the parties may be able to agree as to the disposition of any such interests, as they have done in the case of joint ownerships.

We do not approve of the provisions limiting cross-licensing pending the completion of divorce or the provisions relating to dissolution of joint interests with independents, which have been sufficiently provided for in stipulations of the three major defendants and the orders entered thereon to which we have made reference. Our opinion indicates other changes in the decree proposed by the plaintiff, which should be embodied in the amended decree.

We have specified former findings which should be vacated and in some instances have set forth proper substitutes. Further disposition of any findings to be made should await submission by the parties.

Submit proposed amended decree and findings on or before September 20, 1949.

AUGUSTUS N. HAND

U. S. C. J.

HENRY W. GODDARD

U. S. C. J.

ALFRED C. COXE

U. S. C. J.

Dated July 25, 1949.

(Here follows 2 Pasters, side folios 115, 116)

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[115].

APPENDIX I

Summary of Theatre Holdings—Major Defendants

Towns Under 100,000—1945

	Paramount		Fox		Warner		Loew		RKO		Totals**	
	Towns	Theatres	Towns	Theatres	Towns	Theatres	Towns	Theatres	Towns	Theatres	Towns	Theatres
One deft. owns all affiliated theatres in the town	438	1084	163	398	133	263	8	10	21	34	763	1789
	88%	87%	92%	93%	86%	86%	57%	59%	30%	23%	91.5%	88%
The defts. in the town are pooled as to some or all of their theatres	43	6	1	(1)*	5	5	2	1	39	2	45	14
	9%	10%	.5%	(1)*	3%	4%	14%	18%	60%	73%	5.5%	7%
There is competition between defts.	13	31	13	29	17	30	4	4	6	6	26	9 100
	3%	3%	7.5%	7%	11%	10%	29%	23%	10%	4%	3.0%	5%
Totals	494	1121	177	427	155	298	14	15	66	42	834	1903
	(115)*	(115)*	(1)*	(8)*	(2)*	(2)*	(108)*	(108)*	(117)*	(117)*		
	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

* These theatres were pooled by two defendants. Since each time a theatre was pooled there were two owners involved, the total number of pooled theatre interests was twice the number of theatres pooled. The term "pooled" is here used to include joint ownerships among defendants.

** The total number of towns is not necessarily the sum of the towns listed for each of the five defendants, since some towns have theatres owned by more than one individual defendant and such towns are therefore duplicated in the individual listings.

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APPENDIX 2

Summary of Theatre Holdings—Major Defendants

Towns Over 100,000—1945

	Paramount Towns	Fox Theatres	Warner Towns	Warner Theatres	Loew's Towns	Loew's Theatres	RKO Towns	RKO Theatres	Totals***			
One deft. owns all affiliated theatres in town	20 41%	138 39%	9 53%	70 33%	5 19%	17 7%	4 11%	12 8%	2 6%	49 7%	40 46%	256 23%
The defts. in the town are pooled as to some or all of their theatres	6 12%	15 (50)* 18%	...	5 19%	98 (27)* 51%	1 3%	(10)* 7%	5 16%	2 15%	10 11.5%	115 (61)* 16%	
Holdings of a deft. or pool which dominates affiliates in the town **	5 10%	53 (5)* 17%	3 18%	81 (6)* 41%	2 8% 8%	8 5% 5%	...	2 6%	1 4%	10 (22)*	165	
Holdings in towns dominated by another deft.**	4 ...	3 (9)*	2 (1)*	2 ...	1 ...	4 ...	9 ...	8 (9)*	5 (1)*	11.5% 17%	...	
Holdings where competition exists	14 37%	71 (8)* 26%	3 29%	50 (1)* 26%	13 54%	80 37%	23 86%	104 85%	17 72%	177 74%	27 31.0% 44%	
Totals	49 100%	280 (72)* 100%	17 100%	203 (8)* 100%	26 100%	207 (36)* 100%	37 100%	124 100%	31 100%	204 (20)* 100%	87 (52)* 100%	
											(94)* 100%	

* These theatres were pooled by two defendants. Since each time a theatre was pooled there were two owners involved, the total number of pooled theatre interests was twice the number of theatres pooled. The term "pooled" is here used to include joint ownerships among defendants.

** In arriving at an over-all total of theatres located in towns where one defendant dominated affiliated competition, the theatres of all defendants in such towns have been included because there exists no substantial competition among the defendants in any of them, but in considering records of individual defendants holdings in towns dominated by another defendant were treated as competitive. The ten towns designated as areas where one defendant or a pool dominates all other affiliates are:

Atlanta, Cleveland, Denver, Detroit, Des Moines, Houston, Los Angeles, Paterson, Rochester and San Francisco.

*** The total number of towns is not necessarily the sum of the towns listed for each of the five defendants, since some towns have theatres owned by more than one individual defendant and such towns are therefore duplicated in the individual listings.

UNITED STATES DISTRICT COURT

[Title omitted.]

[fol. 117]

FINDINGS OF FACT*

This action having been duly tried and the proofs and arguments of the respective parties having been duly heard and considered, this court, having filed its opinions herein dated June 11, 1946, and July 25, 1949, does hereby find and decide as follows:

1. The following are definitions of terms used in these findings and in the judgment to be entered hereon:

Block-booking. The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance. The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

[fol. 118] *Exchange District.* An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature. Any motion picture, regardless of topic, the length of the film of which is in excess of 4,000 feet.

Formula Deal. A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross.

Franchise. A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released

*Unless otherwise stated these findings show the situation in 1945.

by one distributor during the entire period of the agreement.

Independent. A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement. A licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres, usually comprising a circuit.

Motion Picture Season. A one-year period beginning about September 1 of each year.

Road-show. A public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs. The successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and shall include also successive exhibitions in different theatres even though such theatres may be under a common ownership or management.

Trade-Showing. A private exhibition of a feature prior to its release for public exhibition.

2. Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, [fol. 119] New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

4. In 1916 or 1917, a group of exhibitors which controlled many of the then best theatres throughout the country organized First National Exhibitors Circuit, Inc. Although this corporation was initially organized to function as a film buying combine, it evolved into a film-producing com-

pany first by financing the production of pictures by others for exhibition in the theatres of its members and finally by producing its own motion pictures.

5. The members of this First National group, consisting of many of the most important exhibitors in the United States controlling many of the best theatres, became franchise holders of the distributing company which they formed. They acquired not only the right to exhibit in their own theatres the pictures produced and distributed by First National, but also they each obtained the right to sub-franchise other exhibitors in their respective territories. In a short time there were some 3,500 franchise holders, representing as many or more theatres.

6. First National soon began to negotiate for the services of well-known stars and directors in the employ of other [fol. 120] producers, including Paramount, and the members of First National began to refuse to exhibit Paramount films. Such well-known stars as Mary Pickford and Norma Talmadge went over to the First National group.

7. Many of the theatres owned by members of First National had, for a long time prior to 1918, exhibited Paramount pictures. The formation and growth of First National gradually cut down the number of Paramount pictures exhibited in the theatres of the First National group. By 1919 Paramount faced a situation where a group of owners of many of the best theatres in the large cities, many of whom had been its customers in the past, had combined together for cooperative buying and had expanded into a strong organization which distributed its own pictures and threatened to supply its members with enough pictures to permit them to operate without using any pictures of other producers, including Paramount.

8. In these circumstances Paramount determined to acquire interests in theatres of its own so that it might assure itself of outlets for Paramount productions. Prior to the fall of 1917 Paramount had no theatre interests. Between 1917 and 1919 it acquired an interest in two theatres in New York City as show windows, to replace the Strand Theatre which had gone over to the First National Group. During that year in conjunction with its representative in the South, it formed Southern Enterprises, Inc., which acquired various theatres in the South. At about the same time Paramount acquired a 50% interest in the Black chain

of theatres in New England. Paramount continued to expand its theatre holdings.

[fol. 121] 9. In January 1932, Paramount went into equity receiverhip in the United States District Court for the Southern District of New York. It stayed in equity receivership until March 1933, when it went into voluntary bankruptcy. It remained in bankruptcy until June 1934, when upon passage of Section 77B of the Bankruptcy Law, it petitioned for reorganization. It was finally reorganized under its present name in June 1935. During these years various companies operating theatres in which Paramount was interested were themselves the subject of bankruptcy or receivership proceedings.

10. Some of the theatre interests which Paramount held at the time of the trial of this action had been acquired and were wholly owned by it either directly or indirectly through subsidiary companies prior to bankruptcy and reorganization. In the course of its reorganization, some of its partly owned theatre interests were created, i.e., in some instances the plan of reorganization approved by this court provided for the sale or other disposition by Paramount of a partial interest (sometimes amounting to 50%, sometimes more and sometimes less) in theretofore wholly owned theatre operating companies, or companies holding legal or equitable interests in theatres or theatre operating companies. The result was the creation of many of Paramount's present partly owned theatre interests.

11. In the course of the reorganization proceedings Paramount lost its interests in some theatres and also changed its relationship with respect to interests in some of its theatre operating companies. The effect of these proceedings and the policy of decentralization inaugurated in the course there, was that in some instances Paramount dis-

[fol. 122]

posed of a partial interest in companies theretofore wholly owned.

12. Loew's Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

13. Radio-Keith-Orpheum Corporation is a corporation

organized and existing under the laws of the State of Delaware, with principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

14. RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

15. Keith-Albee-Orpheum Corporation was a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and was engaged in the business of exhibiting motion pictures prior to its dissolution on September 29, 1944. Approximately 99% of its common stock and 33% of its preferred stock were held by Radio-Keith-Orpheum Corporation.

[fol. 123] 16. RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

17. RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

18. RKO was organized in 1928 by Radio Corporation of America largely for the purpose of obtaining an effective means of developing the use of its motion picture sound recording and reproduction devices in the motion picture production and exhibition fields.

19. At the time of its organization, RKO secured production and distribution facilities by merger with a small company, FBO Productions, Inc., which had limited production facilities and a national distributing organization. RKO invested substantial sums to modernize these facilities.

20. The formation of RKO introduced a new and substantial competitive factor in the production and distribution of motion pictures.

21. During its initial organizational period, RKO acquired interests in a number of companies operating circuits of vaudeville theatres.

[fol. 124] 22. RKO went into receivership in 1933 and continued in receivership and reorganization until 1940. At the time of its receivership RKO operated considerably more theatres than its present total of 106. During the receivership it lost 57 theatres.

23. The organization of RKO did increase competition in each of the three branches of the industry.

24. Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

25. On April 4, 1923, the four Warner brothers, Harry M., Jack L., Albert, and Sam, transferred their business of production and distribution of motion pictures to a corporation known as Warner Bros. Pictures, Inc. (hereafter referred to as Warner).

26. Beginning in 1925, Warner began the work of developing sound pictures, under license and agreements from Western Electric, culminating in the production of such sound pictures as "The Jazz Singer," starring Al Jolson, in October, 1927, and the first 100% talking picture, "The Lights of New York" in the summer of 1928.

27. The Stanley Company of America had in 1928 and for a year prior thereto about 250 theatres situated principally in and around Pennsylvania and New Jersey.

[fol. 125] 28. Negotiations were begun with the view of exchanging stock of Warner for the stock of Stanley Company of America. This transaction was consummated late in 1928.

29. With the acquisition of the stock of Stanley Company of America, Warner acquired 250 theatres which could be immediately equipped with sound installation.

30. In the year and nine months immediately following

the acquisition of the stock of Stanley Company of America Warner secured in a similar fashion several other circuits of theatres owning theatres in the same general locality and a smaller number of theatres scattered in various other parts of the country.

31. In 1931 Warner had an interest in 591 theatres, the largest number of theatres in which Warner has ever had an interest.

32. Today, the Warner companies have an interest in 547 theatres—a net reduction of 44 from its peak holdings of 591 in 1931.

33. First National Pictures, Inc., a corporation engaged in the production and distribution of silent motion pictures, had been organized as far back as 1917 by approximately 24 exhibitors on a cooperative basis for the basis of acquiring film of first quality for exhibition in their own theatres, as well as for distribution by them for other theatres in the respective territories in which they operated.

34. In 1928 Stanley Company of America owned $\frac{1}{3}$ of the stock of First National Pictures, Inc., all the stock of First National Pictures, Inc., being subject to a voting trust.

[fol. 126] 35. Warner acquired as part of the Stanley Company of America transaction in 1928, $\frac{1}{3}$ of the stock of First National Pictures, Inc.

36. At or about the time of the acquisition of the Stanley Company of America stock, or shortly thereafter, Warner purchased another $\frac{1}{3}$ of the stock of First National Pictures, Inc., from other First National Pictures, Inc. stockholders.

37. Subsequently, in 1929, Warner acquired the remaining $\frac{1}{3}$ of the stock of First National Pictures, Inc., from defendant Twentieth Century-Fox.

38. Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures. On July 20, 1944, its name was changed to Warner Bros. Pictures Distributing Corporation.

39. Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is

a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

40. Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in [fol. 127] the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

41. Twentieth Century-Fox produces its features in its own studio in Los Angeles, California, distributes them in this country through thirty-one branches or exchanges which it operates in the principal centers of population, and licenses its features for exhibition in its own and other theatres.

42. Twentieth Century-Fox acquired its initial interest in theatres through the purchase of stock in corporations then engaged in operating theatres. Since such original acquisition, it has acquired additional interests in theatres, some of which were acquired in competition with other defendants and with independent circuits and some of which are new theatres constructed by it.

43. National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

43(a) The theatre holdings of the major defendants have played a vital part in effecting violations of the Sherman Anti-trust Act.

[fol. 128] 43(b) Each of the defendants, Fox, Loew, Paramount, RKO and Warner has since 1940 increased its interest in theatres in which it had had an interest. Fox, Paramount and Warner, and RKO to a lesser extent, have acquired an interest since 1940 in a number of theatres in which they had had no interest prior thereto. The fore-

going acquisitions were permitted under the consent decree of November, 1940.

44. Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

45. Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

46. Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

47. Universal Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1250 Sixth Avenue, New York, [fol. 129] New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries. On May 25, 1943, its name was changed to Universal Pictures Company, Inc., when a subsidiary of the same name was merged into it, but Universal Corporation was the surviving corporation.

48. The corporation named in the complaint as Universal Pictures Company, Inc. was a subsidiary corporation, controlled by Universal Corporation, which was engaged in the business of producing motion pictures, prior to its merger into Universal Corporation on May 25, 1943.

49. Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York,

New York, and is engaged in the business of distributing motion pictures.

50. The Universal group of defendants at the time of the trial consisted of the following corporations: (1) Universal Pictures Company, Inc., (hereinafter sometimes called Universal Pictures), a Delaware corporation with its principal office in New York, N. Y., engaged in the business of producing motion pictures and distributing the same through wholly-owned subsidiaries; (2) Universal Film Exchanges, Inc. (hereinafter sometimes called Universal Film Exchanges), a Delaware corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the United States (except for the Metropolitan District of New York City), [fol. 130] a wholly-owned subsidiary of Universal Pictures; (3) Big U Film Exchange, Inc. (hereinafter sometimes called Big U), a New York corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the Metropolitan District of New York City, a wholly-owned subsidiary of Universal Pictures. The term "Universal" as used herein means any or all of the Universal defendants.

51. Prior to May 25, 1943, the name of Universal Pictures Company, Inc., was Universal Corporation, incorporated in Delaware in 1936. It owned approximately 92% of the outstanding common stock of a Delaware corporation which was incorporated in the year 1925 and was also known as Universal Pictures Company, Inc. Said corporation last-named had its principal office in New York, N. Y., and was engaged in the business of producing motion pictures and distributing the same through its subsidiaries. It owned all of the outstanding stock of Universal Film Exchange, Inc., and 20% of the outstanding common stock of Big U Film Exchange, Inc. The other 80% of said stock was owned by Universal Corporation. On May 25, 1943, Universal Pictures Company, Inc., (Delaware 1925) was merged into Universal Corporation (the surviving corporation), and the name of the surviving corporation was changed to Universal Pictures Company, Inc.

52. Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New

York, and is engaged in the business of distributing motion pictures.

[fol. 131] 53. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

54. During the entire period in question United Artists Corporation distributed photoplays in the United States of America that were produced by David O. Selznick, Mary Pickford, Charles Chaplin, Hunt Stromberg, William Cagney, Bing Crosby, Edward Small, Sol Lesser, Lester Cowan, Jack Skirball, Benedict Bogeaus, Seymour Nebenzal, Jules Levey, David Loew, Arnold Pressburger, Charles R. Rogers, Andrew Stone, Constance Bennett, Howard Hughes, Preston Sturgis, J. Arthur Rank, Edward Golden, or corporations with which the aforesaid individuals were associated and other independent producers.

55. United Artists Corporation maintains 26 branches or exchanges located throughout the United States, and through these facilities it distributes and has distributed all of the product handled by it during the period in question.

56. Paramount Pictures, Inc.; Loew's Incorporated; Radio-Keith-Orpheum Corporation; Warner Bros. Pictures, Inc.; and Twentieth Century-Fox Film Corporation and their respective distribution and exhibition subsidiaries are the five major defendants. Columbia Pictures Corporation, Universal Pictures Company, Inc. and United Artists Corporation and their respective distribution subsidiaries are the three minor defendants.

[fol. 132] 57. As between the eight defendants, Paramount, Loew's, Fox, Warner, Columbia, United Artists, and Universal, there are no officers or directors in common, and none of said defendants owns any controlling stock or other securities in any other of said defendants.

58. Neither of the defendants Columbia, Universal and United Artists owns any theatres.

59. There exists active competition among the defendants and others in the production of motion pictures.

60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to

monopolize or to restrain trade or commerce in any part of the business of producing motion pictures.

61. In the distribution of feature motion pictures no film is sold to the exhibitor; the right to exhibit under copyright is licensed.

62. In licensing features, each of the distributor-defendants has agreed with each of its respective licensees that the licensee should charge no less than a stated admission price during the exhibition of the feature licensed.

63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given theatre are in general uniform, being the usual admission prices currently charged by the exhibitor.

64. The defendant's licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors. Thus there was a general arrangement of [fol. 133] fixing prices in which both the distributors and exhibitors were involved. The licenses required existing admission price schedules to be maintained under severe penalties for infraction. In the case of such exceptional features as "Gone With The Wind", "For Whom The Bell Tolls", "Wilson", and "Song of Bernadette", licensed for exhibition prior to general release and as to which the distributors were not satisfied with current prices, they would refuse to grant licenses unless the prices were raised.

65. The defendants granting film licenses have agreed with their licensees to a system which determines minimum admission prices in all theatres where feature motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the feature motion pictures exhibited either by the defendants or by independents within the United States.

66. All of the five major defendants have a definite interest in keeping up prices in any given territory in which they own theatres and this interest they were safeguarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas. Even if the licenses were at flat rate, a failure to require their licensees to maintain fixed prices would leave them free for lowering the current charge to decrease through competition the income to the licensor on theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned

in all competitive areas. There exists great similarity, and in many cases identity, in the minimum prices fixed for the same theatres in the licenses of all of the defendants.

[fol. 134] 67. The major defendants made operating agreements as exhibitors with each other and with independent exhibitors in which joint operation of certain theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein or are to be jointly determined by other means. These agreements show the express intent of the major defendants to maintain prices at artificial levels.

68. Certain master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area in the United States.

69. Licenses granted by one defendant to another disclose the same interrelationship among the defendants. Each of the five major defendants as an exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum admission prices. RKO, Loew's, Warner, Paramount, and Fox, in granting and accepting licenses with minimum admission prices specified, have among themselves engaged in a national system to fix prices, and Columbia, Universal, and United Artists, in requiring the maintenance of minimum admission prices in their licenses granted to these exhibitor-defendants, have participated in that system.

70. The distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices.

[fol. 135] 71. In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's

feature in the particular competitive area will also be restricted as to maintenance of minimum admission prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby erected.

71(a). This system also restricted competition between the theatres of the major defendants in those areas where there were theatres of more than one defendant since the minimum price to be charged by any theatre licensee was fixed and the licensee was prevented from competing in the business of exhibition by lowering his price.

71(b). Complete freedom from price competition among theatre holders could only be obtained if prices were fixed by all distributors and such a result was substantially obtained. Consequently the system of theatre licensing had a vital and all-pervasive effect in restricting competition of theatre patronage.

[fol. 136] 72. The differentials in admission price set by a distributor in licensing a particular feature in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are *ultimately* to see the feature—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible.

73. Among the provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain feature motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways; in terms of a given period between designated runs; in terms of admission prices charged by competing theatres;

in terms of a given period of clearance over specifically named theatres; in terms of so many 'days' clearance over specified areas or towns; in terms of clearances as fixed by other distributors; or in terms of combinations of these formulae.

74. The cost of each black and white print is from \$150 to \$300, and of a technicolor print is from \$600 to \$800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with [fol. 137] a reasonable protection for the earlier runs is adopted in the way of clearance.

75. Without regard to period of clearance, licensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures.

76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public.

78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business.

79. The major defendants have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents.

80. Some licenses granted clearance to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any [fol. 138] theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement.

81. The distributor-defendants have acted in concert in the formation of a uniform system of clearance for the theatres to which they license their films and the exhibitor-defendants have assisted in creating and have acquiesced in this system.

82. The defendants have acted in concert in their grant of run and clearance.

83. Clearances are given to protect a particular run against a subsequent run and the practice of clearance is so closely allied with that of run as to make findings on the one applicable to the other.

84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearance, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with defendants' theatre or theatres to which the latter had licensed their pictures.

85. The fixed system of runs and clearances which involved a cooperative arrangement among the defendants, was also designed to protect their theatre holdings, safeguard the revenue therefrom, and eliminate competition. The major defendants' predominant position in first-run theatre holdings was strongly protected by a fixed system [fol. 39] of clearances and runs. The power to fix clearances and runs which existed and was exercised by the major defendants was in itself a power to exclude independents who were competitors, and was accompanied by actual exclusion.

85(a). This system gave the defendants a practical control over the run and clearance status of any given theatre. It involved discrimination against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or improving theatres while the major defendants possessed superior advantages. Therefore, though the evidence was insufficient to prove that there was discrimination in negotiation for clearances and runs the atre by theatre, because it was well-nigh impossible to establish that a particular clearance or run was not refused because of the inadequacy of the applicant's theatre, the system of clearances and runs was such as to make com-

petition against the defendants practically impossible, and there was discrimination in particular instances.

86. Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the feature in their several areas, seriously and unreasonably restrain competition.

87. Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any "formula deal" license agreements.

[fol. 140] 88. Master agreements which cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best and leaves other terms to the circuit's discretion, have been entered into by the distributor-defendants and unreasonably restrain trade.

89. Franchises have been entered into by the distributor-defendants with affiliated and non-affiliated circuits which unreasonably restricted the opportunities of small exhibitors to license films in competition with the theatres of such circuits by tying up the films released for long periods of time. None of the major defendants has entered into any franchises since November, 1940 and they have none in existence in 1950.

90. Loew's today has outstanding no franchise agreements for any theatre in which it does not have an interest, and Loew's is not currently granting franchises. During its entire history Loew's, as a distributor, granted a total of 213 franchises, of which 154 were to independent theatres and only 59 to those in which any other producer-exhibitor had an interest.

91. Twentieth Century-Fox has not granted any franchises since June 6, 1940. In 1938-39, the motion picture season in which Twentieth Century-Fox had the greatest number of franchises outstanding, there were 400. Of these, 361 were with independent exhibitors.

92. During the period in question Universal entered into franchise agreements with 727 independent exhibitors and 43 affiliated exhibitors.

[fol. 141] 93. Block-booking, when the license of any feature is conditioned upon taking of other features, is a system which prevents competitors from bidding for single features on their individual merits.

94. For many years the distributor-defendants, except United Artists Corporation, licensed their films in "blocks" or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot, and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block booking and blind-selling based upon the supposed unfairness of contracts which often includes pictures the inferior quality of which could not be known, Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five, however, could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the picture contracted for.

95. United Artists did not at any time license the exhibition of its pictures in blocks but on the contrary licensed the exhibition of its pictures separately and individually.

[fol. 142] 96. During the period in question United Artists did not condition the licensing of any photoplay in any exhibitor's theatre upon that exhibitor's agreement to license other United photoplays for exhibition in said theatre.

97. Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it.

98. Since the consent decree of November 20, 1940, the five major defendants have given each exhibitor, whether a defendant or independent, an opportunity at trade shows to view each feature before licensing it. In general, trade

shows, which are designed to prevent blind-selling, are poorly attended by exhibitors.

99. During the 1943-44 season, the number of features distributed by eight distributor defendants and the three other national distributors were as follows:

[fol. 143]

	Number of Films	Percentages of Total	
		With "Westerns" included	With "Westerns" excluded
Distributor-defendants:			
Fox	33	8.31	9.85
Loew's	33	8.31	9.85
Paramount	31	7.81	9.25
RKO	38	9.57	11.34
Warner	19	4.79	5.67
Columbia	41	10.32	12.24
United Artists	16	4.04	4.78
Universal	49	12.34	14.63
Sub-total	260		
Other National Distributors:			
Republic:			
29 features			
30 "Westerns"	}	14.86	8.66
Monogram:			
26 features			
16 "Westerns"	}	10.58	7.76
PRC:			
20 features			
16 "Westerns"	}	9.07	5.97
Sub-total, 137	397	100	100
Total without "Westerns"	335		

[fol. 144] 100. The approximate total domestic film rental for the features listed in Finding 99 is as follows:

	Percent of Total
Fox	\$50,300,000
Loew	54,700,000
Paramount	41,100,000
RKO	28,500,000
Warner	29,400,000
Columbia	19,600,000
United Artists	14,400,000
Universal	26,300,000
Republic	7,700,000
Monogram	4,500,000
PRC	1,900,000
Total	\$278,400,000
	100

101. Continuously since its organization RKO has distributed features for independent producers. The particular

independent producers whose features have been distributed by RKO have varied from time to time. In the nine seasons ending 1943-44, 19.8% of the features distributed by RKO were independently produced, and 28.4% of RKO's gross receipts from domestic licenses of features was derived from such independently produced features.

102. It would be financially impossible for RKO to operate its theatres on features distributed by RKO alone. [fol. 145] 103. Twentieth Century-Fox produced less than 9 per cent of the total number of features nationally distributed in the United States during each year between 1936-37 and 1944-45.

104. Universal has customarily produced at its studios at Universal City, California, during each theatrical year (commencing on or about September 1st) between 45 and 50 feature-length motion picture photoplays, seven so-called Westerns, four Serials, 15 two-reel subjects, 30 single-reel subjects, and 104 newsreels.

105. Said motion pictures were distributed by Universal and licensed for exhibition by motion picture theatres throughout the United States by means of a system of 31 exchanges located in various States in the United States, from the East Coast to the West Coast and from Canada to the Southern boundary. Universal also maintained a Home Office in the City of New York.

106. In marketing its motion pictures, Universal's usual and customary practice was to offer to license to exhibitors, by title and description as aforesaid, its entire line of pictures, consisting of feature-length motion picture photoplays, Westerns, short-subjects (consisting of serials and two-reel and one-reel pictures) and newsreels. In this way approximately 50 feature-length motion picture photoplays, a group of Westerns, short-subjects, two so-called "Special" photoplays, three features produced by independent producers, and newsreels, were offered to exhibitors by Universal each year.

106(a). During recent years, in excess of 600 feature-length motion picture photoplays were released each year in the United States, exclusive of foreign-made films. [fol. 146] Universal releases of feature-length photoplays, including Westerns and so-called Marquee pictures, during said period, equalled approximately 8% of the total number.

of feature-length photoplays released in the United States each year.

107. During the period in question, United Artists Corporation distributed between 20 to 26 pictures a year when the corporation had a good year and has handled as low as 4 in distribution in a releasing season.

108. At no time during the period in question did United Artists distribute more than 5% of the feature photoplays American made and distributed in the United States of America and generally distributed less than 5% of such releases.

109. That in each distribution agreement with each producer using the facilities of United Artists for distribution among other things there appears substantially the following language:

United agrees to devote its best efforts to the proper marketing and disposition of the motion pictures delivered hereunder in all the territories licensed hereunder wherein it customarily markets motion pictures, and to make such marketing as complete and efficient as practicable, so that the gross returns from the marketing of the product hereunder shall be as large as possible and at the same time consistent with the sound business policy of United.

United will use its best efforts to procure , rices, license fees and rentals in a fair and open market reasonably satisfactory to the Producer.

Exhibition Contracts: The exhibition contracts for each of such motion pictures delivered hereunder shall be made separate and apart from the exhibition contract of any other motion picture marketed by United, with the exception that in territories other than the United States where it is customary to include more than one motion picture on a contract, the Production authorizes United to market its product in accordance with that custom. In no event, however, shall any [fol. 147] motion picture of the Producer be used to enforce the licensing, leasing or other disposition of any other motion picture marketed by United, and in such territory where it is the custom to include on one contract more than one motion picture United shall set

out the respective license fees for each motion picture after the name of such motion picture.

United agrees upon the written direction of Producer that United shall market wherever permissible the motion pictures designated by the Producer or its agent as a unit, and in such case such unit shall be licensed separate and apart from any other motion picture marketed by United, with the exception that in those countries where it is the custom to market all of the motion pictures on one contract, United shall adhere to the prevailing custom.

The Producer shall have the right to designate a representative for the territories hereinafter specified.

The Producer shall bear all the expenses of such representative. Such representative must have an office in the central location of such territory, and if so United shall submit to such representative for his approval or rejection all proposed written contracts with exhibitors for that territory. The territories and their central location are as follows:

Territory	Central Location
United States and Canada	New York
British Isles	London
Australia	Sydney

Producer agrees that such submission shall not be necessary if made impractical by conditions beyond the control of United, such as conditions arising out of war.

If the Producer has designated such a representative for any such territory, United shall submit for his approval or rejection each proposed written contract for the distributing, exhibiting, or marketing of such Producer's motion pictures or any of them in the territory in which such representative is acting. No such contract shall be accepted by United if within three (3) succeeding business days following the date on which said proposed written contract has been received by the Producer or its representative the Producer or its representative shall return such proposed contract to United with its rejection noted thereon or appended thereto.

Should the Producer or its representative reject any such proposed contract the Producer or its representative shall have fourteen (14) days from the date of rejection in which to obtain a more favorable contract. Should the Producer or its representative fail so to do [fol. 148] the original contract shall ipso facto be deemed approved unless the Producer or its representative shall have designated its original rejection as final. No proposed contract on which the rejection has been designated as final shall be entered into by United.

Should the Producer or its representative at any time agree in advance with United upon the rental terms or license fees for the distribution, exhibition, or marketing of any motion picture in any specified theatre or situation, United shall not be obligated to submit the contract containing the terms so agreed upon to the Producer or its representative for approval.

[fol. 149] 110. Various contract provisions by which discriminations against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits were accomplished are: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting move overs and extended runs; granting road-show privileges; allowing overage and underage; granting unlimited playing time; excluding foreign pictures and those of independent producers; granting rights to question the classification of feature for rental purposes. These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. The competitive advantages of these provisions are so great that their inclusion in contract with the larger circuits constitutes an unreasonable discrimination against small competitors.

111. The discriminations referred to in Finding 110 can be enjoined but there is no effective way of preventing similar results from the use of other discriminatory devices in the absence of divorce relief.

112. Agreements were made by the exhibitor-defendants with each other and their affiliates by which given theatres of two or more exhibitors, normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors, and by which profits of the "pooled" theatres were divided among the exhibitors in [fol. 150] or owners of such theatres according to pre-agreed percentages or otherwise. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool". The result is to eliminate competition pro tanto both in exhibition and in distribution of features which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

113. Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool".

114. In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres. This is but another means of carrying out the restraints found above.

115. Many theatres, or the corporations owning them, have been held jointly by one or more of the exhibitor-defendants together with another exhibitor-defendant. These joint interests have enabled the major defendants to operate theatres collectively rather than competitively. When one of the major defendants has owned an interest of five per cent or less, such an interest was *de minimis* and was only to be treated as an inconsequential investment in exhibition. A summary of theatres jointly owned by two

defendants is set forth in the following tabulation taken [fol. 151] from RKO's Exhibit 11:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
 Total	 214 Theatres

The major defendants have, since the remand of this case, entered into orders and stipulations providing for the dissolution of all such joint interests still held by them, except those which were *de minimis*.

116. The interest of Newman in Evergreen State Amusement Corporation was that of an investor.

117. Many theatres, or the corporations owning them, have been held jointly by one or more of the exhibitor-defendants with independents. A summary of such theatres is set forth in the following tabulation taken from RKO's Exhibit 11:

Paramount.....	993
Warner	20
Fox	66
RKO	187
Loew's	21
 Total	 1,287

Some involved no more than innocent investments by those who were not actual or potential theatre operators. Others involved an alliance with one who was or would have been an operator but for the joint ownership, thereby eliminating [fol. 152] putative competition. When a defendant or an independent has owned an interest of five per cent or less, such an interest was *de minimis* and was only to be treated as an inconsequential investment in exhibition. Of the theatres listed above, 177 theatres in which Paramount had an interest and 32 in which RKO had one were *de*

minimis. The dissolution of all joint interests with a present or potential operator has been provided for in orders and stipulations entered into by the major defendants since the remand of this case.

118. In the year 1945 there were about 18,076 motion picture theatres in the United States, of which the five major defendants had interests in 3,137, or 17.35 percent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants, 1,395—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 percent; Fox 636, or about 3.52 percent; and RKO 109, or about .60 percent. There were 361 theatres, or about 2.00 percent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owned an indirect minority stock interest. It includes all theatres in which each defendant otherwise owned a direct or indirect interest of any amount.

119. Former Finding 119 has been vacated.

120. On January 1, 1935, Loew's operated in the United States 126 theatres. The first-run theatres, which are engaged to a large extent in exhibiting Loew's own product, Metro pictures, serve as "show cases" for those pictures [fol. 153] in the areas where the theatres are located.

121. The formation of RKO resulted in the conversion of vaudeville theatres required by it into motion picture theatres and thereby introduced new and substantial competition into the exhibition field in the cities in which each of these theatres was located, except insofar as such competition was affected by the practices of the defendants.

122. Ownership and operation by RKO of theatres in certain principal cities of the United States enables RKO through the utilization of the facilities of such theatres to plan and direct the first exploitation of the features which it distributes in such areas in a more effective manner than is possible in areas where RKO does not operate theatres.

123. The successful exhibition of a feature in its initial runs in any area is widely publicized and closely observed by subsequent run exhibitors in that area and success in

exploiting a picture in such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors.

124. Each of the five major defendants is able to coordinate the initial exhibition of its features in its theatres with an extensive and accurately timed national advertising campaign.

125. Twentieth Century-Fox is interested in theatres in only 16 of the 92 cities having a population of over 100,000. In 12 of these 16 cities features of one or more defendants are licensed to independent first run exhibitors competing with Twentieth Century-Fox [New York, Seattle, Denver, [fol. 154] Portland, Oakland, San Diego, Long Beach, Los Angeles, San Francisco, Spokane, Sacramento, and Kansas City, Kansas] as well as to other defendants having theatres in some of these cities. In three of the remaining four cities, features of one or more defendants are licensed on first run to other defendants.

126. The 17.35% of theatres which comprise the five circuits of the major defendants pay from 35 to 54% of the total domestic film rental, respectively, received by the eight distributor defendants and 45% of the total domestic film rental received by all of said distributor-defendants. The five largest unaffiliated circuits together pay less than 5% of such rental.

127. The major defendants, as distributors, during the 1943-44 season, received from 71 to 81% of the film rental that was paid to all distributors by exhibitors affiliated with the five major defendants. The minor defendants received from 26 to 15% of such rental and the independent distributors from 2 $\frac{1}{2}$ to 4 $\frac{1}{2}$ % of such rental.

128. During the 1943-44 season the eight distributor defendants received 45.2% of the total feature film rental received by them from theatres affiliated with the five major defendants; and 54.8% of such rental from other exhibitors.

129. In some situations where Paramount had theatre interests, other defendant distributors licensed their features to competing theatres and not to the Paramount theatres, and in some cases the operating companies in which Paramount was interested were not able to obtain the right to exhibit the feature of some of the other defendants [fol. 155] ant distributors.

130. Paramount features are licensed for exhibition in

from 8,000 to 14,500 theatres in the United States annually. The number of licenses each year varies from feature to feature and from year to year.

131. In 21 of the 36 out of the 92 cities where Loew's operates theatres none of the other four producer-exhibitors licensed its features in the 1943-44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non-theatre-owning producers.

132. Over the 10 years from 1935 to 1945, the total number of features licensed by the other four theatre-owning distributors to Loew's first-run houses, decreased from 1,382 to 998 and the features of non-theatre-owning distributors increased from 1,201 to 1,879.

133. In 1935, the other four theatre-owning distributors earned \$2,611,986 from Loew's theatres and the non-theatre-owning distributors earned \$2,205,330 (\$406,656 less). In 1944, the non-theatre-owning distributors earned \$5,261,116 in Loew's theatres, which was \$419,477 more than the \$4,841,639, earned in Loew's theatres in that year by the four other theatre-owning distributors.

134. In 1944, the percentage of the total film rental paid by Loew's theatres to each of the non-theatre-owning distributors, Columbia (8.8%), United Artists (8.3%) and Universal (7.4%), was higher than that paid to each of three [fol. 156] producer-exhibitors, RKO [2.1%], Warner Bros. [2.1%] and Twentieth Century-Fox [6.1%].

135. In the year 1944, of the total film rental paid by Loew's theatres, 47.9% was to Loew's itself for the exhibition of Loew's pictures, and 27.1% was to non-theatre-owning distributors. Thus a total of 75% of all film rentals paid by Loew's theatres went to persons other than the four other defendant-producer-exhibitors.

136. During the 1943-44 season RKO received 56.9% of its total license fees from independent theatres, 14.1% from its own theatres, and [in the aggregate] 29% from theatres affiliated with other defendants.

137. In the 1943-44 season, of the total number of exhibitions of features in first-run and metropolitan second-run theatres operated by RKO, 23.1% were exhibitions of features distributed by RKO, 29.6% were exhibitions of features distributed by other theatre-owning distributors, and

100

47.3% were exhibitors of features distributed by non-theatre-owning distributors. In the same season the respective percentages of the feature film rentals paid by RKO were 30.6 to RKO, 43.7 to other theatre-owning defendants, and 23.7 to non-theatre-owning distributors.

138. In the 4 pre-war seasons of 1937-1940, Warner derived about 61.6/10% of its domestic gross rentals from theatres not affiliated with any of the defendants; about 14% from theatres in which it had an interest, about 13% from theatres in which Paramount had an interest, about 4% from theatres in which Twentieth Century-Fox had an [fol. 157] interest, about 6% from theatres in which RKO had an interest, and less than 1% from theatres in which Loew had an interest.

139. Of its total domestic and foreign rentals Warner received about 30% from abroad, about 43% from theatres in which none of the defendants had an interest, about 10% from Warner's own American theatres, and the balance, about 16% from American theatres in which one or more of the defendants had an interest.

140. Not a single one of the Loew first run theatres in the 39 of the 92 largest cities where Loew operates or has an interest in first run theatres licensed a Warner feature for exhibition in the 1943-44 season. In the same season the Warner theatres regularly exhibited the Loew features in many of the 28 of the 92 largest cities where Warner operated or had an interest in first run theatres.

141. The dollars paid by Warner to each of the other defendants and by each of the other defendants to Warner show no uniformity of pattern from company to company from year to year.

142. There were marked variances from year to year in the sums paid as rental by the theatres in which Warner had an interest to United Artists, Universal, and Columbia, the non-theatre owning defendants.

143. Between 1937 and 1944 the theatres in which Warner had an interest substantially decreased the amount of film rental paid to the 5 theatre owning defendants, and substantially increased film rental paid to the non-theatre owning defendants.

[fol. 158] 143(a). During the 9 prewar years of 1933-1941, the average cost of American made Warner features rose

from \$241,000 in 1933 to \$448,000 in 1940. By 1945 the average cost had risen to \$1,371,000.

143(b). In the past the foreign business of Warner has been exceedingly profitable.

143(c). With the cessation of the war the foreign market for Warner pictures are being severely restricted.

144. Of the total film revenue received by Twentieth Century-Fox in 1944 from all theatres in the United States, 60.8 percent was paid by exhibitors not defendants in this action; 14.1 percent was paid by its own theatres; 1.26 percent by Loew theatres; 5.52 percent by RKO theatres; 13.46 percent by theatres in which Paramount had an interest; and 4.82 percent by Warner theatres.

145. On January 1, 1935, there were 13,386 theatres operating in the United States. In 1945, there were 18,076 theatres operating in the United States.

146. In about 60% of the 92 cities having populations over 100,000, there are independent first-run theatres.

147. In about 91 percent of the 92 cities with over 100,000 population there are first run theatres of more than one defendant or of a defendant and independents.

147(a). All the defendants entered into a horizontal conspiracy to fix prices, runs and clearances which was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made [fol. 159] the vertical integration an active aid to the conspiracy. Vertical integration has furnished an incentive for such conspiracy.

147(b). There is close relationship between the vertical integrations and the illegal practices. The vertical integrations were a means of carrying out the restraints and conspiracies.

147(c). The interdependency of defendants to obtain pictures for their theatres, on the one hand, and on the other, to obtain theatre outlets for their pictures has lessened competition among defendants and between them and independents.

147(d). There is substantial proof that monopoly power existed among the eight distributor-defendants who were all working together. Considering that the vertical integrations aided the horizontal conspiracy mentioned in Finding 147(a) at every point, the defendants must be viewed collectively rather than independently as to the power which

they exercised over the market by major defendants' theatre holdings.

147(e). Viewed collectively the major defendants owned in 1945 at least 70 percent of the first run theatres in the 92 largest cities.

148. In the aforementioned 92 cities, at least 70% of all of the first run theatres are affiliated with one or more of the major defendants. In 4 of said cities there are no affiliated theatres. In 38 of said cities there are no independent first run theatres. In the remaining 50 cities the degree of first run competition varies from the most pre-[fol. 160] dominantly affiliated first run situations, such as Boston, Chicago, Los Angeles, Philadelphia, St. Paul, and Washington, D. C., in each of which the independent first run theatres played less than eleven of the defendants' features on first ran during the 1943-44 season, to the most predominantly independent first run situations, such as Nashville, Louisville, Indianapolis, and St. Louis, where the affiliated first run theatres, played at least 31 of the defendants' pictures on first run during that season. In none of the said 50 cities did less than three of the distributor-defendants license their product on first run to the affiliated. In 19 of said 50 cities less than three defendant-distributors licensed their product on first run to independent theatres. In a majority of said 50 cities the major share of all of the defendants' features were licensed for first run exhibition in theatres affiliated with the major defendants.

148(a). Viewed collectively the major defendants owned 60 percent of the first run theatres in cities with populations between 25,000 and 100,000.

148(b). In addition to the proof of monopoly control in cities of more than 25,000, there is substantial proof that in approximately 238 towns involving in all but about 17 cases populations of less than 25,000 but having two or more theatres, some single one of the five major defendants, or in about 18 cases two of the defendants, had all the theatres and therefore possessed a complete local monopoly in exhibition. [See Government Exhibit 488.] This Finding is not applicable to Loew's, which had no theatres in the foregoing towns.

148(c). The film distribution in the 1943-44 season shows that one or more of the five major defendants exhibited on

[fol. 161] first run substantially all of the feature films distributed by the five major defendants in about 43 of the 92 cities of over 100 thousand, and substantially all of the feature films distributed by the eight defendants in about 143 of the 320 cities of 25,000 to 100,000. [See Government Exhibits 489, 490, 490A.]

148(d). As distributors, the five major defendants viewed collectively, received approximately 73 percent and the three minor defendants 21% of the domestic film rentals from the films, except Westerns, distributed in the 1943-44 season.

148(e). The percentages of first run theatre ownership and domestic film rentals controlled by the major defendants when coupled with the strategic advantages of vertical integration created a power to exclude competition from the distribution and exhibition markets when desired.

148(f). This power might be exercised either against nonaffiliated exhibitors or distributors; for the ownership of what was generally the best first run theatres coupled with the possession by the defendant of the best pictures, enabled them substantially to control the market in first-run pictures.

148(g). There is substantial proof that the intent to exercise the monopoly power existed among the defendants.

149. Loew's operates first-run theatres in 36 of the 92 cities in the United States with more than 100,000 population; in every one of these 36 cities, there are other "first run" theatres exhibiting the features of one or more of the other defendant distributors; in 21 of these 36, one or more of the other first-run theatres are operated by independents. [fol. 162].

150. Of the 92 cities in the United States having a population in excess of 100,000, Twentieth Century-Fox is interested in first run theatres in 16 and licenses its features to them. In 4 of the remaining cities, none of the defendants has theatre interests. This leaves 72 cities in which there are first run theatres operated by defendants other than Twentieth Century-Fox. In 23 of the 72 cities, Twentieth Century-Fox licenses its features to independent exhibitors.

151. Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor.

152. The major defendants aided each other in attaining a monopoly of exhibition and in restricting competition by refraining from having theatre interests in many areas where one of them had theatres.

153. In cities of less than 100,000 in population, Paramount, Warner, Fox and RKO owned or operated theatres either in largely separate market areas or in pools, without more than trifling competition among themselves or with Loew's. In cities having a population of more than 100,000, there was in general little competition among the major defendants, although considerably more than in towns of under 100,000.

153(a). In cities of less than 100,000, Paramount had complete or partial interests in or pooling agreements* [fol. 163] with other defendants affecting 1,236 theatres located in 494 towns. In 13 of these towns containing 31 of the theatres—only 3%—were theatres of another defendant. In 9% of these towns competition between Paramount and the only other defendant in the town was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres; and in this 9% were located 10% of Paramount's theatre interests. And in 88% of the towns, containing 87% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus it appears that there was little, if any, theatre competition between Paramount and any other defendant in 97% of the towns of under 100,000 and in respect to 97% of the theatres in which Paramount had an interest.

153(b). Fox had similar theatre interests in 428 theatres located in 177 towns. In 13 of these towns containing 29 Fox theatres, or about 7% thereof, there were theatres of another defendant. In about 93% of the towns containing the same percentage of Fox's theatre interests, Fox was the only defendant operating theatres; in 22 of these towns there was but one theatre and a population capable of supporting only one theatre.

153(c). Warner had similar theatre interests in 306 theatres located in 155 towns of less than 100,000. In 17

* Pooling agreements and joint interests among defendants are treated in Finding 153-153(g) and 154-154(h) as indistinguishable for the purpose of summarizing geographical distribution.

towns, or 11%, containing 30 Warner theatres, or 10% of its holdings, there were theatres of another major defendant. In 3% of the towns, competition between Warner and the only other defendant in the town was substantially lessened or eliminated by means of pooling agreements; [fol. 164] and in this 3% were located 4% of Warner's theatre interests. In 86% of the towns containing the same percentage of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, there appears to have been little, if any, theatre competition between Warner and any other defendant in 89% of the towns and in respect to 90% of the theatres in which Warner had an interest. In 33 of these towns there was but one theatre and a population capable of supporting only one theatre.

153(d). Loew had interests in only 17 theatres located in 14 towns. In 4 towns containing 4 Loew theatres, there were theatres of another defendant. In 2 of the towns, competition was substantially lessened or eliminated by means of joint interests; and in these 2 were located 3 of Loew's theatre interests. In 8 of the towns, containing 10 Loew's theatre interests, Loew was the only defendant operating theatres. Thus, there appears to have been little, if any, theatre competition between Loew and any other defendant in 10 of the towns and in respect to 13 of the theatres in which Loew had an interest.

153(e). RKO had interests in 150 theatres located in 66 towns. In 6 towns, or 10%, containing 6 RKO theatres, or 4%, there was competition with another major defendant. In 60% of the towns, competition was substantially lessened or eliminated by means of pooling agreements, and in this 60% were located 73% of RKO's theatre interests. In 30% of the towns, containing 23% of RKO's theatre interests, RKO was the only defendant operating theatres. Thus, there appears to have little, if any, competition between RKO and any other defendant in 90% of the towns and in respect to 96% of the theatres in which RKO had an interest. [fol. 165]

153(f). The major defendants had interests altogether in 2,020 theatres, located in 834 towns. In 26 towns, or 3% containing 100 of their theatres, or 5%, there was competition among some of them. In somewhat over 5% of the towns, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 5% were located 7% of their theatre

interests. And in somewhat less than 92% of the towns, containing 88% of their theatre interests, only one of the major defendants owned theatres in the area. Thus, there appears to have been little, if any, competition among the five defendants or any of them in 97% of the towns and in respect to 95% of the theatres in which they had an interest.

153(g): The effect of the geographical distribution in towns having a population of less than 100,000 was largely to eliminate competition among all of the defendants in the areas where any of them had theatres. The statistics upon which these findings are based are contained in the appendix to this Court's opinion of July 25, 1949.

154. In cities of over 100,000 Paramount had complete or partial interests in or pooling agreements with other defendants affecting 352 theatres in 49 cities. In 18 of these cities, or 37%, containing 91 Paramount theatres, or 26%, there were theatres of other defendants. In an additional 10% of the cities, containing 17% of Paramount's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Paramount, both on first and later runs, that competition with Paramount was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 12% of these cities competition between Paramount [fol. 166] and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 12% were located 18% of Paramount's theatre interest. And in 41% of the cities, containing 39% of Paramount's theatre interests, Paramount was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between Paramount and any other defendant in 63% of the cities of over 100,000 and in respect to 74% of the theatres in which Paramount had an interest.

154(a). Fox had similar theatre interests in 211 theatres located in 17 cities. In 5 of these cities, or 29%, containing 54 Fox theatres, or 26%, there were theatres of other defendants. In an additional 18% of the cities, containing 41% of Fox's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with Fox, both on first and later runs, that competition with Fox was unsubstantial owing to the dominance which the latter's theatre holdings gave it.

In 53% of the cities, containing 33% of Fox's theatre interests, Fox was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between Fox and any other defendant in 71% of the cities and in respect to 74% of the theatres in which Fox had an interest.

154(b). Warner had similar theatre interests in 243 theatres located in 26 cities. In 14 of those cities, or 54% containing 89 theatres, or 37%, there were theatres of other defendants. In an additional 8% of the cities, containing 5% of Warner's theatre holdings, there were other defendants [fol. 167] having theatre interests, but those interests were so relatively small as compared with Warner, both on first and later runs, that competition with Warner was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 19% of these cities competition between Warner and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 19% were located 51% of Warner's theatre interests. And in 19% of the cities, containing 7% of Warner's theatre interests, Warner was the only defendant operating theatres. Thus, it appears that there was little, if any, competition between Warner and any other defendant in 46% of the cities and in respect to 63% of the theatres in which Warner had an interest.

154(c). Loew had similar theatre interests in 144 theatres located in 37 cities. In 32 of those cities, or 86% containing 122 Loew theatres, or 85%, there were theatres of other defendants. In 3% of these cities, competition between Loew and the only other defendant in the city was eliminated by means of a pooling agreement affecting all of their theatres, and in this 3% were located 7% of Loew's theatre interest. And in 11% of the cities, containing 8% of Loew's theatre interests, Loew was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between Loew and any other defendant in 14% of the cities and in respect to 15% of the theatres in which Loew had an interest.

154(d). In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there [fol. 168] was no competition between them in obtaining

~~ictures.~~ On one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done, it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000.

154(e). RKO had similar theatre interests in 256 theatres in 31 cities. In 22 of these cities, or 72%, containing 190 theatres, or 74%, there were theatres of other defendants. In an additional 6% of the cities, containing 4% of RKO's theatre holdings, there were other defendants having theatre interests, but those interests were so relatively small as compared with RKO, both on first and later runs, that competition with RKO was unsubstantial owing to the dominance which the latter's theatre holdings gave it. In 16% of these cities, competition between RKO and the only other defendants in the city was substantially lessened or eliminated by means of a pooling agreement affecting some or all of their theatres, and in this 16% were located 15% of RKO's [fol. 169] theatre interests. And in 6% of the cities, containing 7% of RKO's theatre interests, RKO was the only defendant operating theatres. Thus, it appears that there was little, if any, theatre competition between RKO and other defendants in 28% of the cities and in respect to 26% of the theatres in which RKO had an interest.

154(f). Approximately 58% of RKO theatre interests were located in New York on neighborhood runs, and the same comments as to distribution of film made in regard to Loew's are applicable to RKO. If its New York neighborhood theatre interests were excluded from the category of theatres in competition with other defendants, the RKO

percentage would then be only about 16% in competition with other defendants.

154(g). The major defendants had interests altogether in 1,112 theatres located in 87 cities of more than 100,000. In 46% of these cities, containing 23% of their theatre interests, only one of the major defendants owned theatres in the area. In 11.5% of the cities, competition between them was substantially lessened or eliminated by means of pooling agreements, and in this 11.5% were located 16% of their theatre holdings. In an additional 11.5% of the cities, containing 17% of their theatre interests, there was more than one defendant having theatre interests in the city, but the position of one defendant was so dominant relative to the others that competition between them was unsubstantial. In 31% of the cities, containing 44% of their theatre interests, there was competition among the defendants. But the New York neighborhood theatres of Loew and RKO, which are included in reaching the 44% figure, should properly be excluded because there is no competition between Loew and RKO in obtaining pictures for the reasons we have already given. This would reduce the [fol. 170] percentage of defendants' theatres which compete with one another to 27.

154(h). The effect of the geographical distribution in cities having a population of more than 100,000 was substantially to limit competition among the major defendants.

155. Although there was no agreement to divide territory geographically in the original organization of the defendant's theatre circuits, the geographical distribution of theatres among the major defendants became a part of a system in which competition was largely absent and the status of which was intentionally maintained by fixed runs, clearances and prices, by pooling agreements and joint ownerships among the major defendants, and by cross-licensing which made it necessary that they should work together.

156. In the relatively few areas where more than one of the major defendants had theatres, competition for first-run licensing privileges was generally absent because the defendants customarily adhered to a set method in the distribution and playing of their films.

156(a). A study of four seasons between the years 1936 and 1944 shows that during this period the privilege of

first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool or an arbitrary division of the product known as a "split."

156(b). Effective relief from the monopoly power of and its exercise by the major defendants cannot be obtained without divorcement. No adequate competition among the [fol. 171] defendants or between defendants and independents can exist in the presence of interdependency among the defendants on the one hand to obtain pictures for their own theatres and on the other to obtain theatre outlets for their own pictures. Divorcement is necessary to prevent the major defendants from being in a state of interdependence which too greatly restricts competition. Divorcement is a necessary remedy to introduce competition into defendants' system of fixed admission prices, clearances and runs, and to remove a major incentive to discriminatory trade practices.

157. The arbitration system and the Appeal Board which has been a part of it have been useful in the past and should be continued upon terms to be settled by the Court.

158. Evidence submitted since the remand of this case has been considered by this Court. Such evidence has been used by the Court in making its findings as to the situation in 1945. The change in status and practices since 1945 revealed by this evidence has been insufficient to warrant a change in the findings and judgment entered herein.

159. A consent judgment was entered on March 3, 1949, against defendants Paramount Pictures Inc. and Paramount Film Distributing Corporation, and neither of these companies nor their counsel appeared or participated in any of the proceedings after the entry of that consent judgment, except that, on April 21, 1949, counsel for these companies presented, and the court made and directed the entry of, an order severing and terminating, as of March 3, 1949, this action as against said defendants.

160. A consent judgment was entered on November 8, [fol. 172] 1948, against defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation, and none of these companies nor their counsel appeared or participated in any of the proceedings

after the entry of that consent judgment, except that on January 18, 1950, counsel for these companies presented, and the court made and directed the entry of, an order styled United States v. Radio-Keith-Orpheum Corporation, et al. severing and terminating, as of November 8, 1948, this action as against said defendants.

[fol. 173]

Conclusions of Law

1. The Court has jurisdiction of this cause under the provisions of the Act of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," hereinafter referred to as the Sherman Act.
2. Universal Pictures Company, Inc., and Screen Gems, Inc. have not violated the Sherman Act and should be dismissed as defendants herein.
3. None of the defendants herein has violated the Sherman Act by monopolizing or attempting to monopolize or conspiring to monopolize the production of motion picture films.
4. The consent decree entered herein on November 20, 1940 does not foreclose enforcement in this suit at this time of any rights or remedies which the plaintiff may have against any of the defendants by virtue of violations of the Sherman Act by them, except such acts as were in accord with such decree during the period it was in force.
5. None of the defendants herein has violated the Sherman Act by combining, conspiring or contracting to restrain trade in any part of the business of producing motion pictures or by monopolizing, attempting to monopolize, or conspiring to monopolize such business.
6. The defendants, and each of them are entitled to judgment dismissing all claims of the plaintiff based upon their acts as producers, whether as individuals or in conjunction with others.
7. The defendants Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation, (formerly known as Vitagraph, Inc.); Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia [fol. 174] bia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film

Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

- (a) Acquiescing in the establishment of a price fixing system by conspiring with one another and with Paramount and RKO to maintain theatre admission prices;
- (b) By conspiring with one another and with Paramount and RKO to restrict competition for theatre patrons with each other and with independents through a system of admission price fixing;
- (c) Conspiring with each other and with Paramount and RKO to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area;
- (d) Fixing, together with Paramount and RKO, a system of runs and clearances which prevented effective competition by outsiders and which was designed to protect the theatre holdings of the major defendants and to safeguard the revenue therefrom.

8. The distributor-defendants Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.); Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both [fol. 175] before and after the entry of said consent decree, in violation of the Sherman Act, by:

- (a) Conspiring with each other and with Paramount and RKO to maintain a nation-wide system of fixed minimum motion picture theatre admission prices;
- (b) Agreeing individually with their respective licenses to fix minimum motion picture theatre admission prices;
- (c) Conspiring with each other and with Paramount

and RKO to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area;

(d) Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in Finding 110 above;

(e) Agreeing individually with such licensees to grant unreasonable clearance against theatres operated by their competitors;

(f) Making master agreements and franchises with such licensees;

(g) Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation;

9. The exhibitor-defendants Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both before and after the entry of said consent decree in violation of the Sherman Act by:

[fol. 176] (a) Jointly operating motion picture theatres with each other, with Paramount and RKO, and with independents through operating agreements or profit-sharing leases;

(b) Jointly owning motion picture theatres with each other, with Paramount and RKO, and with independents through stock interests in theatre buildings;

(c) Conspiring with each other, with the distributor-defendants named in Paragraph 8 above, and with Paramount and RKO, to fix substantially uniform minimum motion picture theatre admission prices, runs, and clearances;

(d) Conspiring with the distributor-defendants named in Paragraph 8 above and with Paramount and RKO to discriminate against independent competitors in fixing minimum admission price, run, clearance, and other license terms.

10. The formula deals, master agreements and franchises referred to in Findings 86, 88, and 89 have tended to restrain trade and violate Section 1 of the Sherman Act.

11. Block-booking, as hereinabove defined, violates the Sherman Act.

12. As an aid to the conspiracy to fix prices, runs, and clearances hereinabove described, and as a means for carrying out such conspiracy, the maintenance of vertical integration by the major defendants named in Paragraph 7 above has violated the Sherman Act and effected a situation where the creation of competition requires dissolution of these vertical integrations:

13. The collective monopoly power of the defendants named in Paragraph 7 above (taken together with Paramount and RKO) to exclude competitors from first run coupled with their intent to exercise this power violated Section 2 of the Sherman Act.

14. Their use of this power to actually exclude [fol. 177] independents from the first run market and to restrict the distribution of pictures to independents violated Sections 1 and 2 of the Sherman Act.

15. The power of the defendants named in Paragraph 7 above to fix runs and clearances when exercised by the major defendants named in Paragraph 7 above to exclude independent competitors violated the Sherman Act.

16. Loew's, Incorporated, has violated the Sherman Act by conspiring with RKO to monopolize and monopolizing the first neighborhood run in New York City, and by the dividing of that market between itself and RKO.

17. Further conclusions of law are made and embodied in the decree filed herewith.

Augustus N. Hand, United States Circuit Judge;

Henry W. Goddard, United States District Judge;

Alfred C. Coxe, United States District Judge.

Dated: February 8, 1950.

[fol. 178] IN UNITED STATES DISTRICT COURT
MANDATE—Filed July 8, 1950

UNITED STATES OF AMERICA, SS:

The President of the United States of America.

To the Honorable the Judges of the United States District Court for the Southern District of New York, (Seal) of the Supreme Court of the United States.)

GREETING:

Whereas, lately in the United States District Court for the Southern District of New York, before you, or some of you, in a cause between the United States of America, Plaintiff, and Loew's Incorporated, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation et al., Defendants, Equity No. 87-273, wherein the decree of the said District Court after remand from the Supreme Court of the United States was duly entered in said cause on the 8th day of February, A.D. 1950, which decree is fully set out in the record of said cause in the office of the Clerk of said District Court and is incorporated herein by reference thereto; as by the inspection of the transcript of the record of the said District Court, which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of appeals sued out by Loew's Incorporated and certain other defendants and the United States of America, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-nine, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record; and was duly submitted.

[fol. 179] On consideration Whereof, it is now here ordered, adjudged and decree by this Court that the decree of the said District Court, dated February 8, 1950, be, and the same is hereby, affirmed.

June 5, 1950

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness, the Honorable Fred M. Vinson; Chief Justice of the United States, the seventh day of July, in the year of our Lord one thousand nine hundred and fifty.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by Hugh W. Barr, Deputy.

[File endorsement omitted.]

[fol. 180] UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF SUTPHEN ESTATES, INC., FOR ALLOWANCE
OF APPEAL

Sutphen Estates Inc., Petitioner, having filed in this Court a Motion for Leave to Intervene and Pleading in Intervention, brought on by order to show cause dated January 2, 1951, so that it might be heard in connection with the settlement of the judgment herein consented to by the United States of America, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.) and Warner Bros. Circuit Management Corporation and in respect of Section VIII thereof, consented to by Harry M. Warner, Albert Warner and Jack L. Warner, and said Motion having come on for argument on January 4, 1951 prior to the signing by the Court of [fol. 181] said consent judgment and the Court having announced at the conclusion of said argument its decision denying said Motion and said Petitioner herein deeming itself aggrieved by the order on said decision entered on February 26, 1951, denying its Motion for Leave to Intervene and by the consent judgment made and entered on January 4, 1951, does hereby petition for an appeal to the Supreme Court of the United States from said order and said consent judgment because of errors prejudicial to it which are set forth in the Assignment of Errors presented and filed herewith.

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, petitioner presents to this Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain the appeal herein, and files herewith its Assignment of Errors and Prayer for Reversal.

WHEREFORE, petitioner prays that an appeal be allowed to the Supreme Court of the United States, that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which the said order and consent judgment were based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided. And petitioner further prays that an order be made fixing the amount of security which petitioner shall give and furnish upon such appeal.

Dated: March 2, 1951.

/S/. Bertram F. Shipman, of Mudge, Stern, Williams & Tucker, No. 40 Wall Street, New York 5, N. Y.,
Attorneys for Petitioner, Sutphen Estates, Inc.

[fol. 182] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

Petitioner, Sutphen Estates, Inc., in connection with its petition for an appeal to the Supreme Court of the United States, hereby assigns error to the Consent Judgment as to the Warner defendants made on January 4, 1951 and entered on January 5, 1951 by the United District Court of the Southern District of New York in the above entitled cause, and to the order made and entered on February 26, 1951 by said Court in said cause denying Petitioner's motion for leave to intervene in said cause, and says that error was committed by said District Court in the making and entering of said Consent Judgment and said order to the prejudice of Petitioner in the following particulars:

[fol. 183] (1) The Court erred in denying Petitioner's Motion for Leave to Intervene;

(2) The Court erred in denying Petitioner's right to file its Pleading in Intervention;

(3) The Court erred in failing to grant the relief requested by Petitioner's Pleading in Intervention;

(4) The Court erred in signing the Consent Judgment without allowing Petitioner to intervene and be

heard on the settlement of said Consent Judgment in so far as valuable contract and property rights of Petitioner were affected by said Consent Judgment;

(5) The Court erred in signing the Consent Judgment without provision therein for the preservation of the rights and property of Petitioner in, to and in respect of the guaranty contract between Petitioner and defendant, Warner Bros., Inc.;

(6) The Court erred in failing to provide for the preservation of the rights and property of Petitioner in, to and in respect of the guaranty contract between Petitioner and defendant, Warner Bros., Inc.;

(7) The Court erred in failing to provide an equivalent or appropriate substitute for the guaranty obligations of defendant, Warner Bros., Inc. under its guaranty contract with Petitioner;

(8) The Court erred in declining to hold that the entry of the Consent Decree without notice to Petitioner and without opportunity to Petitioner to be [fol. 184] heard and present its claim in respect of the guaranty obligation of Warner deprived Petitioner of property without due process of law in violation of the due process clause of the Fifth Amendment of the Constitution of the United States of America.

Wherefore Petitioner prays that the order of the District Court denying Petitioner's motion for leave to intervene be held erroneous and that said order be reversed; that the action of the District Court in failing to make provision for the conservation of, or for a substitute for, the guaranty obligations of defendant Warner Bros., Inc. under its guaranty contract with Petitioner be held erroneous and that said Consent Judgment accordingly be reversed, modified or corrected, and that an appropriate judgment be entered herein.

Dated: March 2, 1951.

/S/. Bertram F. Shipman, of Mudge, Stern, Williams & Tucker, 40 Wall Street, New York 5, N. Y., Attorneys for Petitioner, Sutphen Estates, Inc.

[fol. 185] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL

Sutphen Estates, Inc., having filed a petition for appeal to the Supreme Court of the United States from the judgment made on January 4, 1951 and entered on January 5, 1951; consented to by the United States of America, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.), Warner Bros. Circuit Management Corporation, and in respect of Section VIII thereof, consented to by Harry M. Warner, Albert Warner and Jack L. Warner, and from the order entered herein on February 26, 1951, together with the Assignment of Errors, Prayer for Reversal and Statement as to Jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided, it is hereby

[fol. 186] ORDERED, that an appeal by the above named petitioner in the above entitled cause to the Supreme Court of the United States from said consent judgment heretofore made on January 4, and entered on January 5, 1951 and from the order heretofore entered on February 26, 1951 be and the same hereby is allowed and that the record on appeal be made and certified and transmitted to the Supreme Court of the United States in accordance with the rules of that Court, said appeal being made returnable forty (40) days from the date hereof; and it is hereby further

ORDERED, that the bond on appeal to be approved by this Court is fixed at the sum of \$500.

Dated: March 2nd, 1951.

/S/. Augustus N. Hand, Circuit Judge. /S/. Alfred C. Coxe, D.J.

[fols. 187-189] UNITED STATES DISTRICT COURT

[Citation in usual form, showing service, omitted in printing.]

[fol. 190-191] [Bond on appeal for \$500 approved and filed March 9, 1951 omitted in printing.]

[fols. 192-196] [Notice and proof of service of appeal papers omitted in printing.]

[fol. 197] UNITED STATES DISTRICT COURT

[Title omitted]

PRAECLYPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz.:

1. Opinion of the District Court (sub nom. United States v. Paramount Pictures, Inc., et al.) dated July 25, 1949.
2. Findings of fact and conclusions of law of the District Court, dated February 8, 1950.
3. Final decree of the District Court, dated February 8, 1950 (included as Exhibit 1 in Statement as to Jurisdiction, Item 13, below).
- [fol. 198] 4. Mandate of the Supreme Court made July 7, 1950 and filed in the District Court July 8, 1950.
5. Consent Judgment of the District Court as to the Warner Defendants made January 4, 1951 and entered January 5, 1951 (included as Exhibit 2 in Statement as to Jurisdiction, Item 13, below).
6. Order to Show Cause on Motion to Intervene, Affidavit and Pleading in Intervention of Sutphen Estates, Inc., dated January 2, 1951 (included as Exhibit 4 in Statement as to Jurisdiction, Item 13, below).
7. Order denying intervention of Sutphen Estates, Inc., dated February 26, 1951 (included as Exhibit 3 in Statement as to Jurisdiction, Item 13, below).

8. Petition of Sutphen Estates, Inc. for allowance of appeal dated March 2, 1951.
9. Assignment of Errors and Prayer for Reversal by Sutphen Estates, Inc., dated March 2, 1951.
10. Order Allowing Appeal of Sutphen Estates, Inc., dated March 2, 1951.
11. Citation, dated March 2, 1951.
12. Appeal bond of American Surety Company.
13. Statement as to Jurisdiction with Exhibits dated March 2, 1951.
14. Notice including Statement required by paragraph 3 of Rule 12 of the Rules of the Supreme Court.
15. Proof of Service of the documents designated in paragraphs 8, 9, 10, 11, 13, 15, above.
16. This Praecept and accompanying Proof of Service. [fols. 199-202] Said transcript is to be prepared as required by law and the rules of this Court and rules of the Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court of the United States.

Yours, etc.

Bertram F. Shipman, of Mudge, Stern, Williams & Tucker, 40 Wall Street, New York 5, N. Y., Attorneys for Appellant.

Date: March 7, 1951.

[fol. 203] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 204] UNITED STATES DISTRICT COURT

[Title omitted]

**DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD
DESIRED TO BE INCLUDED**

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and in-

clude in said transcript in their chronological order the following papers, viz.:

1. Consent Decree of the District Court as to the RKO Defendants made and entered November 8, 1948.
2. Consent Judgment of the District Court as to the Paramount Defendants made and entered March 3, 1949.
3. Stenographer's minutes of the hearings of January 4, 1951 in the District Court relating to the proposed consent judgment as to the Warner Defendants and relating to the Motion to Intervene by Sutphen Estates, Inc..
4. Order of the District Court made March 1, 1951 and entered March 2, 1951 with the annexed affidavit of Edward K. Hessberg, sworn to March 1, 1951, which order severs and terminates as against the Warner Defendants, the [fol: 205] action entitled United States of America vs. Loew's Incorporated, et al.
5. This Designation Of Additional Portions Of The Record Desired To Be Included and accompanying Proof of Service.

Said transcript is to be prepared as required by law and the rules of this Court and rules of the Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court of the United States.

Yours, etc.

Joseph M. Proskauer; R. W. Perkins, 321 West 44th Street, New York 18, N. Y. Attorneys for Warner Defendants-Appellees.

Date: April 5, 1951.

[fol. 206] UNITED STATES DISTRICT COURT

[Title omitted]

CONSENT DECREE AS TO THE RKO DEFENDANTS

[fol. 206-A] The plaintiff, United States of America, having filed its Amended and Supplemental Complaint in this action on November 14, 1940; the defendants, including Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation RKO Midwest Corporation,

and Keith-Albee-Orpheum Corporation (hereafter sometimes referred to as the "RKO defendants"), having filed their Answers to such Complaint, denying the substantive allegations thereof; the Court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 1, 1947; the plaintiff and the RKO defendants, among others, having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948; and this Court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this Court; and

[fol. 206-B] The RKO defendants having represented to the plaintiff and to this Court that they propose to put into effect within ninety days of the date hereof a plan of re-organization which will have as its object and effect the divorceement of RKO's production-distribution assets from RKO's theatre assets; that pursuant to such plan two new holding companies will be formed, one of which (hereafter called the New Picture Company) will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the production and distribution of motion pictures, and the other of which (hereafter called the New Theatre Company) will own and control the subsidiaries of Radio-Keith-Orpheum Corporation presently engaged in the exhibition of motion pictures; and that thereafter Radio-Keith-Orpheum Corporation will be dissolved and its stockholders will own all of the capital stock of the New Picture Company and of the New Theatre Company; and that on October 9, 1948, Howard H. Hughes was the owner of record of approximately 24% of the common stock of Radio-Keith-Orpheum Corporation and that on such date no other person or corporation was the beneficial owner of record of as much as 1% of such stock;

The RKO defendants having consented to the entry of this decree before the taking of any testimony upon the issues and matters open upon the remand of this cause; and without any findings of fact upon such issues and matters, and upon conditions that neither such consent, nor this decree, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be

or shall be construed as being an admission or adjudication or evidence that the allegations of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true in so far as they relate to the issues and matters so open, or that the RKO defendants, or any one or more of them, have or has violated or are or is violating any statute or law with respect to the issues and matters so open; and The United States of America by its counsel [fol. 206-C] having consented to the entry of this decree and to each and every provision thereof; and the Court having considered the matter,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

I

The Complaint is dismissed as to all claims made against the RKO defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

II

A. The defendants, Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., their officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the [fol. 206-D] run granted. Whenever any clearance provision is attacked as not legal under the provisions

of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty percent of such features not trade shown prior to the granting [fol. 206-E] of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

B. Upon the dissolution of Radio-Keith-Orpheum Corporation in accordance with the plan of reorganization outlined in the recitals of this decree, and upon the New Picture Company succeeding to the production-distributing assets, the RKO defendants shall cause the New Picture Company to file with the Court its consent to be bound by the terms of sections II, IV, V, VII and VIII of this decree, and

thereafter the New Picture Company shall be in all respects bound by the terms of such sections.

C. At any time after the entry of a final decree in this cause as to the defendants Universal Corporation and Columbia Pictures Corporation, or either of them, Radio-Keith-Orpheum Corporation and the New Picture Company, and RKO Radio Pictures, Inc., or either, or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with this decree and to comply with the provisions of such decree against said defendants Universal Corporation or Columbia Pictures Corporation or either of them, as it shall elect; and thereupon an order or supplemental decree shall be entered on the application of such party or parties so electing, which shall subject such party or parties to the provisions of such other decree and entitle it or them to the benefits of any terms thereof, and relieve it or them from further compliance with the provisions of this section of this decree. The New Picture Company further agrees that this decree may be amended at any time after the entry of such other decree to include such new provisions against film licensing discriminations as may be included in such other decree.

[fol. 206-F]

III

A. The defendants Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, and RKO Midwest Corporation (herein referred to as "the RKO exhibitor-defendants"), their officers, agents, servants and employees are each hereby enjoined:

1. From performing or enforcing agreements referred to in paragraphs A-5 and A-6 of the foregoing section II hereof to which it may be a party;

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant. The existing relationships which violate this provision shall be determined by December 31, 1948. In dissolving such relationships one defendant may acquire the interest of another defendant if such defendant [fol. 206-G.] ant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

6.(a) From acquiring a beneficial interest in any theatre, other than those named in paragraph 9 hereof, unless the acquiring defendant shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.

(b) At any time after the entry of a final decree in this cause in which Paramount Pictures, Inc., Loew's Incorporated, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, or National Theatres, Inc., or either of them, are bound by any provisions relating to the acquisition of beneficial interests in theatres other than acquisitions in conjunction with other exhibitors, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation and the New Theatre Company, or any of them, or their successor or successors, may file herein a written notice of election to be relieved from further compliance with subparagraph (a) of this paragraph 6 and to comply with such provisions; and thereupon an order or supplemental decree shall be entered on the application of such party

or parties so electing, which shall subject such party or parties to the provisions of such other decree relating to the acquisition of beneficial interests in theatres, and entitle it or them to the benefits of any terms thereof, and relieve it or them from further compliance with [fol. 206H] the terms of subparagraph (a) of this paragraph of this decree.

7. From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

8. From making or enforcing any agreement which restricts the right of any other exhibitor to acquire a motion picture theatre.

9. From acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres. The theatres in which such ownership now exist are the following:

<i>Theatre</i>	<i>Location</i>
Academy	New York, New York
Ace	Ozone Park, New York
Alba	Brooklyn, New York
Albany	New Brunswick, New Jersey
Alden	Jamaica, New York
Alhambra	Brooklyn, New York
Ambassador	Brooklyn, New York
Appollo	Jersey City, New Jersey
Astoria	Queens, New York
Bay	Bay City, Michigan
Bayside	Bayside, New York
Benson	Brooklyn, New York
Beverly	Brooklyn, New York
Big Rapids	Big Rapids, Michigan
Bijou	Battle Creek, Michigan
Biltmore	Brooklyn, New York
Boulevard	Jackson Heights, New York
[fol. 206-I]	
Broad	Trenton, New Jersey
Broadway	Astoria, Queens, New York
Broadway	Haverstraw, New York
Broadway	Nyack, New York

<i>Theatre</i>	<i>Location</i>
Bronxville	Bronxville, New York
Brook	Bound Brook, New Jersey
Brunswick	Trenton, New Jersey
Caldwell	St. Joseph, Michigan
Cameo	Ossining, New York
Capitol	Brooklyn, New York
Capitol	Flint, Michigan
Capitol	Jackson, Michigan
Capitol	Jersey City, New Jersey
Capitol	Kalamazoo, Michigan
Capitol	Lansing, Michigan
Capitol	Owosso, Michigan
Capitol	Portchester, New York
Capitol	Trenton, New Jersey
Carroll	Brooklyn, New York
Casino	Ozone Park, New York
Castle Hill	Bronx, New York
Center	Bay City, Michigan
Center	Cadillac, Michigan
Center	Grand Rapids, Michigan
Center	Holland, Michigan
Center	Ionia, Michigan
Center	Ludington, Michigan
Center	Owosso, Michigan
Center	Saginaw, Michigan
Centre	Willow Run, Michigan
[fol. 206-J]	South Haven, Michigan
Claridge	Brooklyn, New York
Clinton	Brooklyn, New York
Colonial	Brooklyn, New York
Colonial	Holland, Michigan
Colony	Brooklyn, New York
Commodore	Brooklyn, New York
Congress	Brooklyn, New York
Corona	Corona, New York
Cove	Glen Cove, New York
Crescent	Astoria, Queens, New York
Cross Bay	Ozone Park, New York
Crosswell	Adrian, Michigan
Crotona	Bronx, New York

Theatre

Culver
Dawn
Della
Desmond
Duffield
Dumont
Eagle
Eastern Parkway
Eastown
Elm
Embassy
Embassy
Englewood
Family
Family
Family
Folly
Forest Hills
[fol. 206-K]
Four Star
Franklin
Fuller
Fulton
Garden
Garden
Gem
Gibson
Gladmer
Glen
Glenwood
Granada
Grand
Grand
Grand
Hackensack
Halsey
Hamilton

Hempstead
Highway
Hill

Location

Brooklyn, New York
Hillsdale, Michigan
Flint, Michigan
Port Huron, Michigan
Brooklyn, New York
Dumont, New Jersey
Pontiac, Michigan
Brooklyn, New York
Grand Rapids, Michigan
Brooklyn, New York
Brooklyn, New York
Portchester, New York
Englewood, New Jersey
Adrian, Michigan
Monroe, Michigan
Port Huron, Michigan
Brooklyn, New York
Forest Hills, New York

Grand Rapids, Michigan
Saginaw, Michigan
Kalamazoo, Michigan
Jersey City, New Jersey
Flint, Michigan
Ozone Park, New York
Brooklyn, New York
Greenville, Michigan
Lansing, Michigan
Glen Cove, New York
Brooklyn, New York
Corona, New York
Astoria, Queens, New York
Chicago, Illinois
Grand Haven, Michigan
Hackensack, New Jersey
Brooklyn, New York
Hamilton Township,
New Jersey
Hempstead, New York
Brooklyn, New York
Hillsdale, Michigan

<i>Theatre</i>	<i>Location</i>
Hillstreet	Los Angeles, California
Holland	Holland, Michigan
Interboro	Bronx, New York
Ionia	Ionia, Michigan
Jackson	Jackson Heights, New York
Jamaica	Jamaica, New York
Jerome	Ozone Park, New York
Keith-Albee	Huntington, West Virginia
Kent	Grand Rapids, Michigan
[fol. 206-L]	
Kew Gardens	Kew Gardens, New York
Kinema	Brooklyn, New York
Lafayette	Suffern, New York
Lake	Benton Harbor, Michigan
Lansing	Lansing, Michigan
Lefferts	Richmond Hill, New York
Liberty	Benton Harbor, Michigan
Liberty	Elizabeth, New Jersey
Lincoln	Trenton, New Jersey
Lincoln	Kearney, New Jersey
Lynbrook	Lynbrook, New York
Lyric	Alpena, Michigan
Lyric	Cadillac, Michigan
Lyric	Ludington, Michigan
Lyric	Manistee, Michigan
Majestic	Traverse City, Michigan
Majestic	Columbus, Ohio
Majestic	Grand Rapids, Michigan
Majestic	Jackson, Michigan
Majestic	Jersey City, New Jersey
Maltz	Port Huron, Michigan
Manhasset	Alpena, Michigan
Marble Hill	Manhasset, New York
Marboro	Bronx, New York
Marcy	Brooklyn, New York
Martha Washington	Brooklyn, New York
Maspeth	Ypsilanti, Michigan
Mecca	Maspeth, New York
Meserole	Saginaw, Michigan
Michigan	Brooklyn, New York
	Ann Arbor, Michigan

[fol. 206-M] *Theatre*

	<i>Location</i>
Michigan	Battle Creek, Michigan
Michigan	Jackson, Michigan
Michigan	Kalamazoo, Michigan
Michigan	Lansing, Michigan
Michigan	Muskegon, Michigan
Michigan	Saginaw, Michigan
Michigan	South Haven, Michigan
Michigan	Traverse, Michigan
Midway	Forest Hills, New York
Model	South Haven, Michigan
Monroe	Monroe, Michigan
Monticello	Jersey City, New Jersey
Nemo	New York, New York
Northtown	Lansing, Michigan
Oakland	Pontiac, Michigan
Oasis	Ridgewood, New York
Ogden	Bronx, New York
Orpheum	Ann Arbor, Michigan
Orpheum	Huntington, West Virginia
Orpheum	Kalamazoo, Michigan
Orpheum	Pontiac, Michigan
Our	Grand Rapids, Michigan
Palace	Bergenfield, New Jersey
Palace	Flint, Michigan
Palace	Trenton, New Jersey
Pantages	Hollywood, California
Parkhill	New York, New York
Park Plaza	Bronx, New York
Parthenon	Brooklyn, New York
Pascack	Westwood, New Jersey
Pelham	Bronx, New York

[fol. 206-N]

Pilgrim	Bronx, New York
Playhouse	Great Neck, New York
Plaza	Englewood, New Jersey
Post	Battle Creek, Michigan
Rainbow	Brooklyn, New York
Ramsdell	Manistee, Michigan
Reade	Highland Park, New Jersey
Reade's Trent	Trenton, New Jersey
Ready	Niles, Michigan

<i>Theatre</i>	<i>Location</i>
Regent	Allegan, Michigan
Regent	Battle Creek, Michigan
Regent	Bay City, Michigan
Regent	Flint, Michigan
Regent	Jackson, Michigan
Regent	Kearny, New Jersey
Regent	Muskegon, Michigan
Republic	Brooklyn, New York
Rex	East Rutherford, New Jersey
Rex	Jackson, Michigan
Rialto	Jersey City, New Jersey
Rialto	Pontiac, Michigan
Rialto	Three Rivers, Michigan
Ridgewood	Brooklyn, New York
Rivera	Brooklyn, New York
Riverside	New York, New York
Riviera	New York, New York
Riviera	Niles, Michigan
Rivoli	Three Rivers, Michigan
Rivoli	Hempstead, New York
Rivoli	New Brunswick, New Jersey
Rivoli	Rutherford, New Jersey
[fol. 206-O]	
RKO Proctor's	Newark, New Jersey
Robinhood	Grand Haven, Michigan
Rockland	Nyack, New York
Roosevelt	Flushing, New York
Roosevelt	Woodhaven, New York
Roxy	Flint, Michigan
Roxy	Sturgis, Michigan
Royal	Grand Rapids, Michigan
Savoy	Brooklyn, New York
Scarsdale	Scarsdale, New York
Senate	Brooklyn, New York
Silver	Greenville, Michigan
Southtown	Lansing, Michigan
Square	Bronx, New York
Squire	Great Neck, New York
Stadium	Brooklyn, New York
State	Ann Arbor, Michigan
State	East Lansing, Michigan

<i>Theatre</i>	<i>Location</i>
State	Flint, Michigan
State	Huntington, West Virginia
State	Jersey City, New Jersey
State	Kalamazoo, Michigan
State	Muskegon, Michigan
State	New Brunswick, New Jersey
State	Pontiac, Michigan
State	Trenton, New Jersey
Steinway	Astoria, Queens, New York
Stoddard	New York, New York
Stone	Brooklyn, New York
Strand	Battle Creek, Michigan
Strand	Flint, Michigan
[fol. 206-P]	
Strand	Jersey City, New Jersey
Strand	Niles, Michigan
Strand	Owosso, Michigan
Strand	Pontiac, Michigan
Strand	Rockville Center, New York
Strand	Saginaw, Michigan
Strand	Sturgis, Michigan
Sunnyside	Woodside, New York
Supreme	Brooklyn, New York
Surf	Brooklyn, New York
Teaneck	Teaneck, New Jersey
Temple	Saginaw, Michigan
Times	Cincinnati, Ohio
Tipton	Huntington, West Virginia
Tivoli	Jersey City, New Jersey
Trabay	Traverse, Michigan
Triboro	Astoria, Queens, New York
Tuxedo	Bronx, New York
Uptown	Kalamazoo, Michigan
Utica	Brooklyn, New York
Valentine	Bronx, New York
Valley Stream	Valley Stream, New York
Victoria	Ossining, New York
Victory	Bayside West, New York
Vogue	Manistee, Michigan
Waldorf	Brooklyn, New York
Walker	Brooklyn, New York

<i>Theatre</i>	<i>Location</i>
Ward	Bronx, New York
Wealthy	Grand Rapids, Michigan
Westown	Bay City, Michigan
Westwood	Westwood, New Jersey
[fol. 206-Q]	
Whitney	Ann Arbor, Michigan
Wilson	Brooklyn, New York
Wolverine	Saginaw, Michigan
Wuerth	Ann Arbor, Michigan
Wuerth	Ypsilanti, Michigan
43rd Street	Long Island City, New York
77th Street	New York, New York

The existing joint ownership in the above enumerated theatres shall be terminated within one year from the date hereof in accordance with the following provisions:

(a) As to not to exceed thirty theatres from the above list, the RKO exhibitor-defendants or the New Theatre Company may elect to terminate such ownership either by acquiring the interest of the co-owner or co-owners therein, or by sale of the interest of RKO therein in accordance with paragraph (b) hereof. Such thirty theatres may include the Alden Theatre, Jamaica, N. Y.; the Midway Theatre, Forest Hills, N. Y.; and two of the following theatres: Castle Hill, Marble Hill, and Pelham Theatres, Bronx, New York. Except for such four theatres, none of such thirty theatres shall be located in New York City. In the event that the existing joint interest in the RKO Proctor's Theatre at Newark, N. J., is not terminated within one year in accordance with the provisions of this paragraph, such joint interest may continue, provided that one of the joint owners shall have the sole management of the theatre and the other shall exercise no control of any kind over the theatre, except to receive fixed payments during the balance of the agreements, which shall not be determined by the net earnings of the theatre.

[fol. 206-R] As to the remainder of the theatres above listed, including all other of such listed theatres located in New York City, the RKO exhibitor-defendants shall terminate such relation by a sale or other disposition of the interest of RKO therein, which may be either (i) to a co-owner or co-owners; or (ii) to a party not a defendant and not owned or controlled by or affiliated with a defendant in this cause.

B. In the event that the RKO exhibitor-defendants shall, pursuant to the provisions of section III-A-9-(a), acquire the interest of their co-owners in all the theatres now owned, leased, or operated by Trenton-New Brunswick Theatres Company in Trenton, New Jersey, the RKO exhibitor-defendants shall dispose of all of their interest in one first-run theatre in Trenton. The RKO exhibitor-defendants shall effect such disposition within one year from the date of their acquisition of such theatres, and shall effectuate this provision by a sale to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

C. Within one year of the date hereof, the RKO exhibitor-defendants shall dispose of all their interest in two of the theatres now operated by them on first-run in the central business district of Cincinnati, Ohio. The RKO exhibitor-defendants shall effectuate this provision by a sale to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

D. For the purpose of any application or applications for approval of any proposed acquisition, the plaintiff and the RKO exhibitor-defendants hereby waive the necessity of convening a court of three judges pursuant to the expediting certificate filed herein on June 13, 1945; and agree that any application, after reasonable notice of hearing has been given to the Attorney General, may be determined [fol. 206-S] by any judge of the District Court for the Southern District of New York.

E. Upon the dissolution of Radio-Keith-Orpheum Corporation pursuant to the plan of reorganization outlined in the recitals of this decree, and upon the New Theatre Company succeeding to the theatre assets, the RKO defendants

shall cause the New Theatre Company to file with the Court its consent to be bound by sections III, IV, V, VII and VIII of this decree, and thereupon the New Theatre Company shall become and thereafter be in all respects bound by the terms of such sections of this decree.

IV

Commencing one year after the entry of this decree the New Theatre Company and the New Picture Company shall be operated wholly independently of one another and shall have no common directors, officers, agents, or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever.

V

Howard R. Hughes represents that he now owns approximately 24 percent of the common stock of Radio-Keith-Orpheum Corporation. Within a period of one year from the date hereof, Howard R. Hughes shall either:

A. Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theatre Company, as he may elect, to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant in this cause; or

B. Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New [fob 206-T] Theatre Company, as he may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with respect thereto. Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such vot-

ing trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trustee shares, and proceeds from the sale thereof.

For the purpose of evidencing his consent to be bound by the terms of section V of this decree, Howard R. Hughes individually has consented to its entry and it shall be binding upon his agents and employees.

VI

A. Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of RKO Radio Pictures, Inc., during the period required for the completion of the reorganization of the RKO defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Radio-Keith-Orpheum Corporation has or may acquire pursuant to the terms of this decree a proprietary interest of ninety-five percent or more either directly or through subsidiaries.

[fol. 206-U] B. From and after the effective date of the reorganization of the RKO defendants, the provisions of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or RKO Radio Pictures, Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this decree.

VII

A. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under

the control of such defendant, relating to any of the matters contained in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this decree as from time to time may be necessary for the purpose of enforcement of this decree.

[fol. 206-V] B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VIII

A. This decree is rendered and entered in lieu of and in substitution for the decree of this court dated December 31, 1946. This decree shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the RKO defendants shall not have been approved by the stockholders of Radio-Keith-Orpheum Corporation within 90 days from the entry of this decree.

B. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Dated:

November 8, 1948.

Augustus N. Hand, United States Circuit Judge;
 Henry W. Goddard, United States District Judge;
 Alfred E. Coxe, United States District Judge.

[fol. 206-W] We hereby consent to the entry
of the foregoing decree:

For the Plaintiff

Herbert A. Bergson

Robert L. Wright

Sigmund Timberg

George H. Davis, Jr.

For the Defendants:

Radio-Keith-Orpheum Corporation,
RKO Radio Pictures, Inc.
RKO Proctor Corporation,
RKO Midwest Corporation, and
Keith-Albee-Orpheum Corporation

By

William J. Donovan

Ralstone R. Irvine

Gordon E. Youngman

Their Attorneys

I hereby consent to the entry of
section V of the above decree:

Howard R. Hughes,

By Ralstone R. Irvine

His Attorney

[fol. 207-1] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, Plaintiff,
against

PARAMOUNT PICTURES INC., ET AL., Defendants

Consent Judgment as to the Paramount Defendants

The plaintiff, United States of America, having filed its Amended and Supplemental Complaint in this action on November 14, 1940; the defendants, Paramount Pictures Inc. and Paramount Film Distributing Corporation, (here-

(hereafter sometimes referred to as the "Paramount defendants"), having filed their Answers to such Complaint, denying the substantive allegations thereof; the Court after trial having entered a decree herein, dated December 31, 1946; as modified by order entered February 11, 1947; the plaintiff and the Paramount defendants, among others, having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948; and this Court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this Court; and

[fol. 207-2] The Paramount defendants, having represented to the plaintiff and to this Court that they propose, for the purpose of avoiding discrimination against other exhibitors and distributors, promoting substantial independent theatre competition for the Paramount theatres and promoting competition in the distribution and exhibition of films generally, (1) to divorce their domestic exhibition business from their production and distribution business, (2) to divest Paramount Pictures Inc. and the divorced exhibition business of all interest in a minimum of 774 theatres, and (3) to subject themselves and said divorced distribution and exhibition businesses to injunctive provisions, all as hereinafter set forth; and that accordingly they propose to adopt prior to April 19, 1949, a plan of reorganization which will have as its purpose and effect the complete divorce of the ownership and control of all of the theatre assets of Paramount Pictures Inc. located in the United States from all other assets of the Paramount defendants; that pursuant to such plan two new corporations will be formed, one of which (hereinafter called the New Theatre Company) will own directly or indirectly all of the said theatre assets; and the other of which (hereinafter called the New Picture Company) will own directly or indirectly all of the said other assets; and that thereafter Paramount Pictures Inc. will be dissolved; and that for the purpose of establishing separate ownership and control of the said two new corporations the stock of the New Theatre Company will be delivered to a Trustee who will hold such stock subject to the terms and conditions of this judgment, and certificates of interest representing such

trusteed stock will be issued by the Trustee, and such certificates of interest together with the stock in the New Picture Company will be distributed pro rata by Paramount Pictures Inc. among its stockholders; and Paramount Pictures Inc. having set forth certain understandings with and made certain representations to the Attorney General in a letter filed herewith; and

The Paramount defendants having consented to the [fol. 207-3] entry of this judgment after taking of evidence upon the remand of this cause by the Supreme Court to this Court but without rendition of any decision by this Court upon any of the issues and matters which were to be determined upon said remand, without any findings of fact upon such issues and matters made after said remand, and without admission by the Paramount defendants in respect to any such issue or matter, and the Court having considered the matter.

NOW, THEREFORE, UPON CONSENT OF THE PARTIES HERETO, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

The Complaint is dismissed as to all claims made against the Paramount defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

II

A. The Paramount defendants, their officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

[fol. 207-4] 4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty percent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there [fol. 207-5] has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each licensee

shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

B. If a final judgment be entered in this cause against Loew's Incorporated, Twentieth Century-Fox Film Corporation, and Warner Bros. Pictures, Inc., or any of them, which shall prescribe for any of such defendants provisions for licensing the exhibition of feature motion pictures different from those required by this judgment, the Paramount defendants or the New Picture Company or either or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with such provisions of this judgment and to comply with such provisions of such judgment against said defendants or any of them, and thereupon an order or supplemental judgment shall be entered on the application of such party or parties so electing, which shall subject such party or parties to such provisions of such other judgment and entitle it or them to the benefits of any terms thereof and relieve it or them from further compliance with such provisions of this judgment.

III

A. The defendant Paramount Pictures Inc. (hereinafter in this Section III referred to as "Paramount"), its officers, agents, servants and employees are each hereby enjoined:

1. From performing or enforcing agreements referred to in paragraphs A-5 and A-6 of the foregoing section II hereof to which it may be a party.
- [fol. 207-6] 2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.
3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.
4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or

to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant.

(a) The said existing relationships in connection with the theatres in Michigan (excluding Detroit) named in paragraph 9 hereof shall be terminated by November 8, 1949 in accordance with the provisions relating to such theatres set forth in such paragraph 9.

(b) The said existing relationship in connection with the Great Lakes, Hippodrome, Niagara, Seneca, Kenmore, Buffalo, Teck, Bellevue, Kensington, North Park, Lackawanna, and Elmwood Theatres in Greater Buffalo, N. Y., shall be terminated by March 31, 1949, and the said existing relationship in connection with the Roosevelt Theatre, Buffalo, N. Y., shall be terminated by December 31, 1949. Paramount or the New Theatre Company may elect to acquire the interest of the co-owner or co-owners in the five theatres first mentioned in this sub-paragraph (b).

(c) The said existing relationships in connection with the Parkhill Theatre, Yonkers, N. Y., shall be terminated by November 8, 1949 in accordance with the provisions relating to such theatre set forth in paragraph 9 hereof.

[fol. 207-7] 6. From acquiring a beneficial interest in any theatre other than those named in paragraph 9 hereof, provided that:

(a) Until the joint ownerships set forth in paragraph 9 have been completely terminated, as provided for in said paragraph, beneficial interests in theatres may be acquired

(i) As a substantially equivalent replacement for wholly owned theatres held or acquired in conformity with this judgment which may be lost through physical destruction or conversion to non-theatrical purposes;

* As used herein the phrase "wholly owned theatre" means a theatre in which Paramount or the New Theatre Company, or Paramount or the New Theatre Company together with persons who are solely investors, own a beneficial interest of 95% or more.

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- (ii) In renewing leases covering any wholly owned theatre held or acquired in conformity with this judgment or in acquiring an additional interest in any such theatre under lease;
 - (iii) As a substantially equivalent replacement for any wholly owned theatre held or acquired in conformity with this judgment which has been lost through inability to obtain a renewal of the lease thereof upon reasonable terms, if Paramount or the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition;
 - (iv) In one theatre in Miami, Florida, Chattanooga, Tennessee, Salt Lake City, Utah, and Tampa, Florida, respectively (which theatres Paramount represents it plans to construct upon sites now controlled by it and are to be substantially equivalent replacements for theatres heretofore lost by fire or failure to obtain renewal of leases), if Paramount or the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will [fol. 207-8] not unduly restrain competition.

(b) After termination of the joint ownerships set forth in paragraph 9 hereof, Paramount or the New Theatre Company may acquire a beneficial interest in any theatre only in the situations covered by paragraphs (i) and (ii) of the preceding sub-section (a) unless the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition will not unduly restrain competition.

7. From operating, booking or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

8. From making or enforcing any agreement which restricts the right of any other exhibitor to acquire a motion picture theatre.

9. From acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any bene-

ficial interest in motion picture theatres. The theatres in which such ownership now exists are the following:

STATE	CITY	NAME OF THEATRE
ALABAMA	Anniston	Calhoun Cameo Noble Ritz Tiger Grand State Alabama Lyric Ritz Grand Temple Drive-In Chickasaw Ensley (suburb of Birmingham) Jasper
	Auburn Bessemer Birmingham	Chickasaw Ensley Franklin Jasper New Crown Drive-In Empire Lyric Loop Saenger Charles Clover Empire Grand Paramount Strand Walton Wilby Enzor Bama Diamond Druid Ritz Studio Drive-In Indian Head Drive-In
[fol. 207-9]	Mobile	
	Montgomery	
	Selma	
	Troy Tuscaloosa	
ARIZONA	Phoenix	
ARKANSAS	Camden Clarksville Conway	Rialto Ritz Strand Joy Strand Conway Grand
[fol. 207-10]		

STATE ARKANSAS (Cont.)	CITY	NAME OF THEATRE
	Dardanelle	Joy
	Fayetteville	Ozark
		Palace
		Royal
		U-Ark
	Fort Smith	Hoyts
		Joie
		New
		Plaza
		Temple
		Uptown
	Helena	Paramount
		Pastime
	Hope	New
		Rialto
		Saenger
	Hot Springs	Central
		Malco
		Paramount
	Jonesboro	Victory
		Liberty
		Palace
		Strand
	Little Rock	Arkansas
		Capitol
		Drive-In
		Heights
		Lee
		New
		Prospect
		Pulaski
		Roxy
		Royal
		Ritz
		Rialto
		Capitol
		Strand
		Malco
		Saenger
		Strand
	Russellville	Ritz
	Smackover	Joy
	Stuttgart	Majestic
	Van Buren	Strand
		Bob Burns
		Rio
CALIFORNIA	Hollywood	Paramount

[fol. 207-11]

STATE FLORIDA	CITY Pensacola	NAME OF THEATRE
GEORGIA	Athens	Drive-In Isis Rex Saenger
	Augusta	Georgia Morton Palace Ritz Strand Imperial Miller Modjeska Rialto Ritz Bijou Ritz Roxy
	Barnesville	Allen
	Brunswick	Colonial
[fol. 207-12]	Buford	Bradley
	Columbus	Georgia
	Elberton	Rialto
	Gainesville	Royal
	Lexington	Springer
	Macon	Village
	Moultrie	Rexview Drive-In
	St. Simons Island	Elbert
	Savannah	Ritz
	Waycross	Roxy
		Royal
		State
		Lex
		Capitol
		East Macon
		Rialto
		Grand
		Ritz
		Colquitt
		Moultrie
		Casino
		Avon
		Beach
		Bijou
		Lucas
		State
		Victory
		Carver
		Lyric
		Ritz

STATE	CITY	NAME OF THEATRE
IDAHO	Boise	Ada Boise Granada Pinney
[fol. 207-13]		
ILLINOIS	Chicago	Iris McVickers North-Center United Artists
	Galesburg	Colonial
	LaSalle	LaSalle
	Moline	Majestic
	Oak Park	Illini Le Claire Lake
	Peru	Lamar Peru
	Quincy	Star Orpheum
	Rockford	Washington Auburn Coronado Midway Palace Times Fort Armstrong
	Rock Island	Rocket Spencer
INDIANA	Gary	Grand State
IOWA	Algona	Call
	Boone	Iowa Boone Princess
	Burlington	Rialto Capitol Palace
	Cedar Falls	Zephyr
	Cedar Rapids	Regent Paramount
	Centerville	State Majestic
	Chariton	Ritz
	Charles City	Ritz State Charles
	Clarion	Gem
	Clear Lake	Clarion Lake

[fol. 207-14]

STATE	CITY	NAME OF THEATRE
IOWA (Cont.)		
	Clinton	Park
	Cresco	Capitol
	Davenport	Rialto
	Des Moines	Strand
[fol. 207-15]	Eagle Grove	Cresco
	Estherville	Capitol
	Forest City	Esquire
	Fort Dodge	Garden
	Grinnell	Des Moines
	Iowa City	Garden
	Mason City	Hiland
	New Hampton	Ingersoll
	Newton	Paramount
	Oelwein	Roosevelt
	Oskaloosa	Uptown
	Ottumwa	Strand
	Sioux City	Eastown
		Iowa
		Drive-In
		Princess
		Grand
		Forest
		Iowa
		Rialto
		Strand
		Iowa
		Strand
		Englert
		Strand
		Varsity
		Cecil
		Palace
		Strand
		Firemens
		Capitol
		Rialto
		Grand
		Ritz
		Mahaska
		Princess
		Rivoli
		Capitol
		Ottumwa
		Rialto
		Strand
		Zephyr
		Capitol
		Drive-In

STATE	CITY	NAME OF THEATRE
IOWA (Cont.)		Hipp Hollywood Iowa State Victory Paramount Strand
[fol. 207-16]	Waterloo	
KENTUCKY	Fulton	Fulton
	Henderson	Orpheum Strand Kentucky
	Owensboro	Kraver Bleich Maleo Seville Strand
LOUISIANA	Alexandria	Paramount
	Baton Rouge	Rex Saenger Drive-In Fort Louisiana Paramount
	Monroe	Varsity Capitol Delta
	New Orleans	Paramount Globe Saenger Tudor Centenary Drive-In Majestic Rex
	Shreveport	Saenger Strand Venus West End
[fol. 207-17]		
MAINE	Auburn	Auburn
	Augusta	Colonial Capitol Bijou
	Bangor	Opera House Park

STATE	CITY	NAME OF THEATRE
MAINE (Cont.)	Brunswick	Cumberland
	Gardiner	Pastime
	Hallowell	Opera House
	Lewiston	Rialto
		Empire
		Priscilla
		Strand
	Livermore Falls	Dreamland
	Norway	Rex
	Orono	Strand
	Ramford	Strand
	South Paris	Strand
	Wilton	Wilton
MASSACHUSETTS	Chicopee	Rivoli
	Fitchburg	Fitchburg
	Greenfield	Garden
	Haverhill	Colonial
	Holyoke	Paramount
		Bijou
		Strand
		Victory
	North Adams	Paramount
[fol. 207-18]	Northampton	Richmond
		Calvin
		Plaza
	Palmer	Strand
	Pittsfield	Capitol
		Colonial
		Palace
		Strand
	Springfield	Paramount
		Broadway
	Ware	Casino
	Westfield	Strand
MICHIGAN	Adrian	Croswell
	Allegan	Family
	Alpena	Regent
	Ann Arbor	Lyric
		Malz
		Orpheum
		Michigan
		State
		Whitney
	Battle Creek	Wuerth
		Bijou
		Michigan
		Post

STATE	CITY	NAME OF THEATRE
MICHIGAN (Cont.)		
[fol. 207-19]		
	Bay City	Regent Strand Bay Center Regent Westown Lake Liberty
	Benton Harbor	Big Rapids Center
	Big Rapids	Big Rapids Center
	Cadillac	Lyric Alger Royal
	Detroit	United Artist
	East Lansing	State Capitol
	Flint	Della Garden Palace Regent Roxy State Strand
	Grand Haven	Grand Robinhood
	Grand Rapids	Center Eastown Royal Four Star Kent Majestic Our Wealthy
	Greenville	Gibson Silver Dawn Hill
	Hillsdale	Center Colonial
	Holland	Holland Center
	Ionia	Ionia Capitol Majestic
	Jackson	Michigan Regent Rex
[fol. 207-20]	Kalamazoo	Capitol

STATE	CITY	NAME OF THEATRE
MICHIGAN (Cont.)		
	Lansing	Fujler
		State
		Michigan
		Orpheum
		Uptown
		Capitol
		Gladmer
		Lansing
		Michigan
		Nortown
		Southown
		Center
		Lyric
		Lyric
		Ramsdell
		Vogue
		Family
		Monroe
		Michigan
		Regent
		State
		Ready
		Riviera
[fol. 207-21]		
	Oyosso	Capitol
		Center
		Strand
		Eagle
		Oakland
		Orpheum
		Rialto
		State
		Strand
		Desmond
		Family
		Majestic
		Center
		Franklin
		Mecca
		Michigan
		Strand
		Temple
		Wolverine
		Caldwell
		Michigan
		Model
		Roxy
		Strand
	St. Joseph	
	South Haven	
	Sturgis	

STATE	CITY	NAME OF THEATRE
MICHIGAN (Cont.)		
	Three Rivers	Rialto
	Traverse City	Riviera
	Willow Run	Michigan
	Ypsilanti	Trabav
		Center
		Martha Washington
		Wuerth
[fol. 207-22]		
MINNESOTA	Fairmont	Nicholas
		Strand
MISSISSIPPI	Biloxi	Buck
	Clarksdale	Saenger
	Columbus	Delta
	Greenville	Paramount
	Greenwood	Dixie
	Gulfport	Princess
	Hattiesburg	Varsity
		Delta
		Paramount
		Le Flore
		Paramount
		Gulf
		Paramount
		Buck
		Lomo
		Rose
	Jackson	Saenger
		Century
		Drive-In
		Majestic
		Paramount
		Pix
	Meridian	Alberta
		Strand
		Temple
	Natchez	Baker Grand
		Ritz
	Tupelo	Lyric
		Tupelo
	Vicksburg	Alamo
		Saenger
		Strand
	West Point	Ritz
		Star
[fol. 207-23]	Winona	Winona

STATE

NEBRASKA

CITY

Fairbury

Falls City

Grand Island

Hasting

Omaha

NAME OF THEATRE

Bonham

Majestic

Oil City

Rivoli

Capitol

Empress

Grand

Rivoli

Strand

Omaha

Orpheum

Paramount

Drive-In

NEW HAMPSHIRE

Berlin

Albert

Princess

Strand

Capitol

Star

Colonial

Olympia

Concord

Portsmouth

Adams

Paramount

U. S.

NEW JERSEY

Newark

Paterson

Chief

Kimo

Lobo

Mission

Rio

Sunshine

Yucca

Drive-In

Mesa

[fol. 207-24]

NEW MEXICO

Albuquerque

Avon

State

Rivoli

Tioga

Capitol

Paramount

Regent

Amuzu

Capitol

Parkhill

NEW YORK

Fulton

New York City

Owego

Rochester

Waverly

Yonkers

Asheboro

Asheville

Carolina

Imperial

Isis

Palace

NORTH CAROLINA

STATE

CITY

NAME OF THEATRE

N. CAROLINA
(Cont.)

[fol. 207-25]

Burlington	Paramount Plaza State Commitment to build new theatre
Canton	Alamance Carolina Paramount
Chapel Hill	Colonial Strand Carolina Village
Concord	Cabarrus Paramount
Durham	Carolina Center
Fayetteville	Rialto Broadway Carolina Colony Lyric
Gastonia	Temple Carolina
Goldsboro	Paramount
Greensboro	Wayne Carolina Imperial Natiopal Colony
Greenville	Pitt State Carolina
Hendersonville	State Center
Hickory	Park
High Point	Broadhurst Center Paramount
Lenoir	Rialto Center State
Lexington	Carolina
Lumberton	Granada Carolina
Monroe	Pastime Center
Mt. Airy	State Center

[fol. 207-26]

STATE	CITY	NAME OF THEATRE
N. CAROLINA (Cont.)		
	Raleigh	Ambassador
		Capitol
		Palace
		State
		Varsity
		Little
	Rockingham	Richmond
		Carolina
	Rocky Mount	Center
		Capitol
	Salisbury	State
		Victory
		Bailey
		Bijou
	Wilmington	Carolina
		Royal
		Ritz
	Wilson	Carolina
		Ritz
		Wilson
	Winston-Salem	Carolina
		State
		Colonial
		Forsyth

[fol. 207-27]

NORTH DAKOTA
PENNSYLVANIA

Jamestown	Star
Aliquippa	Rialto
	State
	Strand
	Temple
Ambridge	State
Bloomsburg	Capitol
	Columbia
Butler	Capitol
	Penn
Carlisle	Comerford
	Strand
Danville	Capitol
Dickson City	Rex
Dunmore	Orient
Duryea	Pastime
Forest City	Freedman
Forty Fort	Forty Fort
Hawley	Institute
Hazleton	Ritz
	Capitol
	Feeley

STATE	CITY	NAME OF THEATRE
PENNSYLVANIA (Cont.)		
	Honesdale	Grand
[fol. 207-28]	Jersey Shore	Lyric
	Kingston	Victoria
	Lebanon	Kingston
	Luzerne	Capitol
	Mauch Chunk	Colonial
	Miners Mills	Jackson
	Northumberland	Luzerne
	Old Forge	Capitol
	Olyphant	Crystal
	Parsons	Savoy
	Pittston	Holland
	Plymouth	Olyphant
	Pottsville	Granada
	Sayre	Parsons
	Scranton	American
		Roman
		Shawnee
		Capitol
		Hippodrome
		Hollywood
		Sayre
		Bell
		Capitol
		Comerford
		Family
		Globe
		Rialto
		Riviera
		Roosevelt
		State
		Strand
		Temple
		Westside
	Shenandoah	Pinebrook
	Sunbury	Strand
[fol. 207-29]	Towanda	Rialto
	Wilkes-Barre	Strand
		Keystone
		Capitol
		Comerford
		Hart
		Orpheum
		Penn
		Sterling
		Strand
		Temple
		Irving

STATE	CITY	NAME OF THEATRE
PENNSYLVANIA (Cont.)	Williamsport	Capitol Keystone
SOUTH CAROLINA	Anderson Columbia Darlington Florence Greenville Greenwood	Drive-In Drive-In Liberty Darlington Carolina Colonial Drive-In Carolina Ritz State
SOUTH DAKOTA	Madison	Lyric State
TENNESSEE	Elizabethton Jackson Kingsport Memphis	Bonnie Kate Ritz Paramount State Met Drive-In State Malco Strand
TEXAS	Abilene Amarillo Anahuae Arlington Arp Austin	Majestic Palace Paramount Queen Capitol Paramount Rialto State Esquire Rig Aggie Texan Rex Paramount Queen State Austin Capitol Texas Varsity

[fol. 207-30]

STATE	CITY	NAME OF THEATRE
TEXAS (Cont.)	Baytown	Arcadia
	Beaumont	Bay
		Gem
		Jefferson
		Lamar
		Liberty
		Star
		Tivoli
		Peoples
	Breckenridge	Circle Drive-In
[fol. 207-31]	Brownsville	National
	Brownwood	Palace
		Capitol
		Queen
		Bowie
		Lyric
		Gem
		Sanja
	Channelview	Crighton
	Conroe	Liberty
	Corsicana	Grand
	Dallas	Ideal
		Palace
		Rio
		Capitol
		Dalsec
		Fair
		Forest
		Majestic
		Melba
		Palace
		Rialto
		Tower
		White
		Circle
		Inwood
		Knox
		Lakewood
		Lawn
		Esquire
		Varsity
		Village
		Wilshire
		Telenews
		Drive-In-Buckner Blvd
		Drive-In-Northwest
		H'way
	Denison	Rialto
		Rio

STATE,
TEXAS
(Cont.)

[fol. 207-32]

CITY

NAME OF THEATRE

Denton	State Dreamland Palace Texas Plaza Cole Majestic Lyric Ellanay Palace Pershing Plaza Texas Grand Wigwam Bowie Gateway Hollywood Majestic Palace Parkway River Oaks Worth Tower Varsity Bowie Drive-In Belknap Drive-In 7th St. Theatre Key Martini Queen State Tremont Broadway Cozy Gregg Palace Palace Texan Colonial Rialto Texan Lyric Cole Arcadia Grande Rialto Strand Palace
El Paso	
Fort Worth	
Galveston	
Gladewater	
Goose Creek	
Greenville	
Groves	
Hallettsville	
Harlingen	
Henderson	

[fol. 207-33]

STATE	CITY	NAME OF THEATRE
TEXAS (Cont.)		
	Houston	Strand Alabama Almeda Bluebonnet Eastwood Kirby Majestic Metropolita North Main River Oak Tower Village Wayside Yale Santa Rosa Broadway Garden Oaks Fulton Shepard Drive-In So. Main Drive-In Winkler Drive-In
[fol. 207-34]	Jacksonville	Jackson Palace 9 Rialto Crim Strand Texan Port Arlyne Rembert Rita Lynn Pines Texan Azteca Palace Queen El Rey Lynn Paramount
	Kilgore	
	La Porte	
	Lontview	
	Lufkin	
	McAllen	
	Marshall	
	Mercedes	
	Nacogdoches	
	Nederland	
	Needville	
		Rex Rio State Rita Stonefort Texan Rio Cole

STATE	CITY	NAME OF THEATRE
TEXAS (Cont.)	Orange	Bengal Gem Royal Strand
[fol. 207-35]	Overton	Gem Strand
	Paris	Grand Main North Star Plaza Rex
	Pelly	Alamo
	Pharr	Drive-In
	Port Arthur	Majestic Pearce Peoples Port Sabine Strand Surf Drive-In
	Port Neches	Lynn Neches
	Richmond	Lamar
	Rosenberg	Cole
	Rusk	State Cherokee
	San Antonio	Aztec Empire Majestic Texas Broadway Laurel State Sunset Woodlawn
	San Marcos	Hayes Palace Texas Palace Pines Arcadia Bell Gem Rio Texas Drive-In Paramount Strand Texan
[fol. 207-36]	Silsbee	
	Temple	
	Texarkana	

STATE	CITY	NAME OF THEATRE
TEXAS (Cont.)		
	Tyler	Arcadia Liberty Majestic Tyler
	Vernon	Pictorium Vernon
	Waco	Orpheum 25th Street Texas Waco
	Wallis	Circle Drive-In
	Weslaco	Cole Gem
	Wichita Falls	Ritz Majestic State Strand Wichita
	Yoakum	Grand Ritz
[fol. 207-37]		
UTAH	Ogden	Colonial Orpheum Paramount
VERMONT	Brattleboro Burlington	Paramount Flynn Majestic
	Montpelier	Capitol
VIRGINIA	Cape Charles Charlottesville	Radium Jefferson Lafayette Paramount University
	Danville	Capitol Dan Rialto
	Exmore Hampton	Cameo Langley Rex
	Hilton Village Lynchburg	Village Isis
	Newport News	Paramount Trenton James
	Phoebeus	Paramount Lee

STATE	CITY	NAME OF THEATRE
WEST VIRGINIA	Bluefield	Granada
	Wheeling	State
WISCONSIN	LaCrosse	Rex Fifth Avenue Hollywood

[Vol. 207-38] The existing joint ownership in the above enumerated theatres shall be terminated as to all such theatres within three years from the date of entry of this judgment, and as to at least one-third of such theatres within one year from such date, and as to at least two-thirds of such theatres within two years from such date, in accordance with the following provisions:

(a) Paramount or the New Theatre Company shall terminate the existing joint ownerships in each of said theatres by a sale or other outright transfer of the entire interest of Paramount or the New Theatre Company therein either (i) to a co-owner or co-owners, or (ii) to a third person who is not a defendant herein and not owned or controlled by or affiliated with a defendant herein, except as otherwise provided in sub-paragraph (b) below.

(b) In the event that Paramount's interest in any joint ownership shall not be terminated as provided in sub-paragraph (a), Paramount or the New Theatre Company may acquire the interest of such co-owner or co-owners, after first negotiating for such acquisition with such co-owner or co-owners, in not to exceed the following theatres from the above list in each of the following communities:

State	City	Theatres
Alabama	Anniston	Any two of the theatres above listed, only one of which may be a first run theatre.*

* The term "first run theatre", as used in this judgment (except where otherwise specifically stated), shall be understood to mean not necessarily the best theatre of the joint ownership or of Paramount in the particular city, but a theatre which in size, location and physical appointments is suitable for operation upon a regular policy of first run exhibition of the better pictures released by the eight distributor defendants.

[fol. 207-39]

<i>State</i>	<i>City</i>	<i>Theatres</i>
Alabama (Cont.)	Auburn Bessemer Ensley Jasper Selma Birmingham	Tiger Theatre. Any one of the theatres above listed in each of these cities.
	Chickasaw Mobile	Any four of the theatres above listed, only two of which may be first run theatres.
	Montgomery	Chickasaw Theatre. Any four of the theatres above listed, only one of which may be a first run theatre.
	Troy Tuscaloosa	Any three of the theatres above listed, only one of which may be a first run theatre.
Arizona	Phoenix	Enzor Theatre.
Arkansas	Camden Jonesboro	Any three of the theatres above listed, only one of which may be a first run theatre.
[fol. 207-40]	Fayetteville Fort Smith Hot Springs	Either one of the two drive-in theatres above listed.
	Little Rock	Any one of the theatres above listed in each of these cities.
Florida	Pensacola	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
Georgia	Athens Augusta Brunswick Columbus Gainesville Macon Waycross	Any two of the theatres above listed.
		Any three of the theatres above listed, only one of which may be a first run theatre.
		Any one of the theatres above listed in each of these cities.

<i>State</i>	<i>City</i>	<i>Theatres</i>
Georgia (Cont.)	Savannah	Any two of the theatres above listed, only one of which may be a first run theatre.
Idaho	Boise	Any two of the theatres above listed, only one of which may be a first run theatre.
Illinois	LaSalle Moline Oak Park Peru Quincy Rock Island Rockford	Any one of the theatres above listed in each of these cities.
[fol. 207-41]		Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
Indiana	Gary	Any one of the theatres above listed.
Iowa	Cedar Rapids	Any one of the theatres above listed.
	Davenport	Any two of the theatres above listed, only one of which may be a first run theatre.
	Des Moines	Any six of the theatres above listed, only two of which may be first run theatres.
	Sioux City Waterloo	Any one of the theatres above listed in each of these cities.
Kentucky	Fulton	Any one of the theatres above listed.
	Owensboro	Any two of the theatres above listed, only one of which may be a first run theatre.
Louisiana	Alexandria Mónroe	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
[fol. 207-42]	Baton Rouge New Orleans	Any one of the theatres above listed in each of these cities.

<i>State</i>	<i>City</i>	<i>Theatres</i>
Louisiana (Cont.)	Shreveport	Any four of the theatres above listed, only one of which may be a first run theatre.
Maine	Bangor Lewiston	Any one of the theatres above listed in each of these cities.
Massachusetts	Haverhill Holyoke North Adams Northampton Pittsfield Springfield	Any one of the theatres above listed in each of these cities.
Michigan	Ann Arbor Battle Creek Flint Grand Rapids Kalamazoo Lansing Pontiac Saginaw Detroit	Any one of the theatres above listed in each of these cities.
		The Royal Theatre, provided however, that promptly after the acquisition by Paramount or the New Theatre Company of the interest of the co-owner therein, Paramount or the New Theatre Company shall lease the said theatre to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein and which lease shall contain no rental provisions based upon a share of the profits of such theatre or any other theatre, and provided further that Paramount or the New Theatre Company shall sell such theatre property as soon as practicable and in any event before the expiration of such lease.
[fol. 207-43]		
Minnesota	Fairmont.	Any one of the theatres above listed.
Mississippi	Biloxi Clarksdale Greenville	Any one of the theatres above listed in each of these cities.

<i>State</i>	<i>City</i>	<i>Theatres</i>
Mississippi (Cont.)	Greenwood Gulfport Natchez Hattiesburg Meridian Vicksburg	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
	Jackson	Any three of the theatres above listed, only one of which may be a first run theatre.
	Winona	Winona Theatre.
[fol. 207-44] Nebraska	Fairbury Falls City Hastings Grand Island	Any one of the theatres above listed in each of these cities.
	Omaha	Any two of the theatres above listed, only one of which may be a first run theatre.
New Hampshire	Concord Portsmouth	Any two of the theatres above listed.
New Jersey	Newark	Any one of the theatres above listed.
New Mexico	Albuquerque	Any one of the theatres above listed.
New York	Fulton	Any one of the theatres above listed.
	New York City Rochester	Rivoli Theatre.
No. Carolina	Asheboro Asheville	Any two of the theatres above listed, only one of which may be a first run theatre.
		Carolina Theatre. Any four of the theatres above listed (and which list shall be deemed to include the theatre in this city, when built, as to which there is a commitment to build), provided that such four theatres

<i>State</i>	<i>City</i>	<i>Theatres</i>
No. Carolina (Cont.)		shall not include, and Paramount or the New Theatre Company shall concurrently dispose of the interest of Paramount in, one first run theatre in this city.
[fol. 207-45]	Burlington Durham Fayetteville Goldsboro Greensboro Greenville High Point Salisbury Wilmington Wilson Winston-Salem Canton Chapel Hill Concord Gastonia Hendersonville Hickory Lumberton Monroe Rockingham Rocky Mount Raleigh	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
		Any one of the theatres above listed in each of these cities.
[fol. 207-46].		Any three of the theatres above listed, only one of which may be a first run theatre.
Pennsylvania	Aliquippa Bloomsburg Butler Carlisle Hazelton Lebanon Pittston Pottsville Shenandoah Sunbury Wilkes-Barre Williamsport Scranton	Any one of the theatres above listed in each of these cities.
		Any two of the theatres above listed.

<i>State</i>	<i>City</i>	<i>Theatres</i>
So. Carolina	Anderson Columbia Greenville Greenwood	The drive in theatre in each of these cities.
So. Dakota	Madison	Any two of the theatres above listed; only one of which may be a first run theatre.
Tennessee	Elizabethton Jackson Memphis Kingsport	Any one of the theatres above listed.
[fol. 207-47] Texas	Abilene Beaumont Breckenridge Brownwood Brownsville Corsicana Denison Denton Galveston Harlingen McAllen Orange Paris Port Arthur Temple Tyler Vernon Wichita Falls Austin	Any one of the theatres above listed in each of these cities. State Theatre.
	Amarillo El Paso Texarkana Waco Dallas	Any three of the theatres above listed, only one of which may be a first run theatre.
	Fort Worth	Any two of the theatres above listed (only one of which may be a first run theatre) in each of these cities.
		Any seven of the theatres above listed; only two of which may be first run theatres.
		Any four of the theatres above listed, only one of which may be a first run theatre.

<i>State</i>	<i>City</i>	<i>Theatres</i>
Texas <i>(Cont.)</i>		
[fol. 207-48]	Houston	Any seven of the theatres above listed, only one of which may be a first run theatre.
	San Antonio	Any four of the theatres above listed, only one of which may be a first run theatre.
Utah	Ogden	Any two of the theatres above listed, only one of which may be a first run theatre.
Virginia	Charlottesville Lynchburg Newport News	Any one of the theatres above listed in each of these cities.
Wisconsin	La Crosse	Any one of the theatres above listed.

(c) With respect to any jointly owned theatre as to which Paramount's interest shall not be sold or otherwise transferred in accordance with the provisions of sub-paragraph (a) or as to which the interest of the co-owner or co-owners shall not be acquired by Paramount or the New Theatre Company under the provisions of sub-paragraph (b) of this paragraph 9, Paramount or the New Theatre Company may negotiate with a third person who is not a defendant herein and not owned or controlled by or affiliated with a defendant herein, for a sale of the entire joint interest in such theatre to such third person and may negotiate for the acquisition thereof and thereafter acquire the interest of its co-owner or co-owners for the sole purpose of effectuating such a sale, provided that such sale shall be consummated not later than six months following such acquisition and shall create substantial motion picture theatre operating competition in any community in which Paramount or the New Theatre Company shall retain any theatre.

[fol. 207-49] 10. From voting its stock in any of the corporations through which said joint ownerships are held for the purpose of preventing corporate action which will effectuate dissolution of such joint ownerships upon reasonable terms in accordance with paragraph 9 hereof.

B. Paramount owns a beneficial interest in the following theatres, and the only other beneficial interests in such theatres are those of persons who are solely investors: Houlton and Temple Theatres, Houlton, Me.; Empire, Park and Strand Theatres, Rockland, Me.; Chateau, Empress, Lawler and Time Theatres, Rochester, Minn.; Avon, Broadway, State and Winona Theatres, Winona, Minn.; and Grand, Paramount and Strand Theatres, Rutland, Vt.

1. As to not exceed the following theatres from the above list, Paramount or the New Theatre Company may elect to acquire the interest of the co-owner or co-owners therein, or to sell or otherwise transfer the interest of Paramount therein in accordance with the provisions of sub-paragraph (a) or (c) of paragraph 9 of sub-section A of this Section III, or to continue the same in the existing joint ownership applicable thereto:

Any one of the theatres above listed in Houlton, Me.

Any two of the theatres above listed in Rockland, Me., only one of which may be a first run theatre.

Any two of the theatres above listed in Rochester, Minn., only one of which may be a first run theatre.

Any two of the theatres above listed in Winona, Minn., only one of which may be a first run theatre.

Any two of the theatres above listed in Rutland, Vt., only one of which may be a first run theatre.

2. The remainder of the theatres above listed in the first [fol. 207-50] paragraph of this sub-section B shall be disposed of by Paramount or the New Theatre Company, or by the existing joint ownership if continued as above provided for in this sub-section B, to a person not a defendant herein and, not owned or controlled or affiliated with a defendant herein, in accordance with the provisions of sub-paragraph (a) or (c) of said paragraph 9.

3. The provisions set forth in paragraphs 1 and 2 of this sub-section B shall be effectuated within two years from the date hereof and in such a manner as to create substantial motion picture theatre operating competition in any community in which Paramount or the New Theatre Company, or the joint ownership if continued as above provided, shall retain any theatres.

C. 1. For the purpose of creating substantial motion picture theatre operating competition in the communities hereinafter listed, Paramount or the New Theatre Company shall dispose of all of the interest of Paramount in at least one half of the following motion picture theatres within one year from the date hereof, and in all of the following motion picture theatres within two years from the date hereof, and each such disposition shall be to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein:

One theatre in each of the following cities in Florida: Bartow and Bradenton.

Two theatres in Clearwater, Fla.*

One first run theatre in Daytona Beach, Fla.

One theatre in DeLand, Fla.

Two theatres in Fort Lauderdale, Fla., one of which shall be a first run theatre.

[fol. 207-51] The Ritz Theatre in Fort Myers, Fla.

One first run theatre in Gainesville, Fla.

One theatre in Hollywood, Fla., which theatre shall not be the theatre located in the Hollywood Hotel.

Three theatres in Jacksonville, Fla., one of which shall be a first run theatre.

Two theatres in Lakeland, Fla., one of which shall be a first run theatre.

One theatre in Lake Worth, Fla.

One first run theatre in Ocala, Fla.

Two theatres in Orlando, Fla., one of which shall be a first run theatre.

One theatre in Plant City, Fla.

One theatre in St. Augustine, Fla.

Four theatres in St. Petersburg, Fla., of which one shall be a first run theatre.

One theatre in Sanford, Fla.

One theatre in Sarasota, Fla.

One first run theatre in West Palm Beach, Fla.

One theatre in Winter Park, Fla.

One first run theatre in Atlanta, Ga.

One theatre in Preston, Idaho.

One first run theatre in Bloomington, Ill.

*One of these two theatres shall be the Bellevue, which is located in a hotel.

- One first run theatre in Elgin, Ill.
 One first run theatre in Kankakee, Ill.
 One theatre in Pekin, Ill.
 One first run theatre in Peoria, Ill.
 One first run theatre in South Bend, Ind.
 One theatre in Danville, Ky.
 One theatre in Bath, Maine.
 The Regent Theatre and the Annex Theatre, Detroit,
 Mich.
 One theatre in Austin, Minn.
 One first run theatre in Mankato, Minn.
 One first run theatre in Minneapolis, Minn.
 One first run theatre in St. Cloud, Minn.
 One first run theatre in St. Paul, Minn.
 [fol. 207-52] One theatre in Peekskill, N. Y.
 One first run theatre in Poughkeepsie, N. Y.
 One first run theatre in Charlotte, N. C.
 One first run theatre in Fargo, N. D.
 One first run theatre in Minot, N. D.
 One theatre in Bellevue, Ohio.
 One first run theatre in each of the following cities:
 Fremont, Ohio, Hamilton, Ohio, and Middletown, Ohio.
 One first run theatre in each of the following cities:
 Columbia, S. C. and Spartanburg, S. C.
 One theatre in Sumter, S. C.
 One first run theatre in Aberdeen, S. D.
 One first run theatre in Huron, S. D.
 One first run theatre in Watertown, S. D.
 One first run theatre in Chattanooga, Tenn.
 Two first run theatres in Knoxville, Tenn.
 One theatre in Logan, Utah.
 One theatre in Provo, Utah.
 One theatre in Barre, Vt.
 One theatre in Eau Claire, Wis.

As to not exceed twelve of the foregoing theatres, in the event that Paramount or the New Theatre Company is unable to sell on reasonable terms, Paramount or the New Theatre Company, upon application to the Court in any such case and with the approval of the Court first obtained, may lease or sublease the same to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein; on condition, however, that no such lease or

sublease shall contain any rental provisions based upon a share of the profits of the theatre covered by the lease or any other theatre; and further on condition that Paramount or the New Theatre Company shall thereafter sell its interest in any such theatre so leased or subleased as soon thereafter as it can do so upon reasonable terms and in any event prior to the expiration of such lease or sublease.

[fol. 207-53] 2. If the existing decree entered in the United States District Court for the Northern District of Illinois, Eastern Division, in the case of Florence B. Bigelow, et al., against RKO Radio Pictures Inc., et al., shall be modified or vacated, and if, after such modification or vacating, the competitive situation in outlying Chicago (outlying Chicago for the purposes hereof including the entire city of Chicago except the downtown portion of Chicago and also including Berwyn, Blue Island, Chicago Heights, Evanston, La Grange and Oak Park) shall be less favorable for the independent exhibitors in outlying Chicago (an independent exhibitor for the purposes hereof meaning an exhibitor who is not a defendant herein or owned or controlled by or affiliated with a defendant herein), and if such less favorable competitive situation shall be shown by the Attorney General to the satisfaction of the Court in which this consent judgment is entered, then such Court may order such relief against, or with respect to, the theatres of Paramount or the New Theatre Company located in outlying Chicago as it may deem just or proper in order to create proper competitive conditions in outlying Chicago or in any particular section thereof.

3. As to the cities hereinafter mentioned in this paragraph 3, Paramount or the New Theatre Company (in lieu of disposing of the interest of Paramount in any motion picture theatres in such cities) shall commence within six months from the date hereof, and shall thereafter, until in any case the Attorney General otherwise consents in writing or, if such consent cannot be obtained, the Court otherwise orders, operate (a) only one first run theatre*,

*The term "first run theatre," as used in this paragraph 3, shall be understood to mean a theatre with a policy of playing features in the particular city on a first run basis, other than second choice or western features or features released by distributors other than the defendants herein.

[fol. 207-54] as distinguished from a theatre or theatres operating other than first run, in each of the following cities: Tucson, Ariz.; Aurora, Ill.; Alton, Ill.; Danville, Ill.; Decatur, Ill.; Galēsburg, Ill.; Kewanee, Ill.; Joliet, Ill.; Waukegan, Ill.; Grand Forks, N. D.; Anderson, S. C.; Greenville, S. C., and Mitchell, S. D., and (b) only two first run theatres in San Francisco, Cal., in Duluth, Minn., and in Sioux Falls, S. D.

D. If Paramount so elects, the "theatre assets of Paramount located in the United States" and to be transferred to the New Theatre Company as provided in this judgment may be construed as not to include the Paramount Theatre property in New York, N. Y. Such property, if not so included, shall be regarded as being included in the other assets of the Paramount defendants to be transferred to the New Picture Company as provided in this judgment, provided, however, that (a) the theatre portion of such property may not be operated by the New Picture Company and may not be leased by Paramount or the New Picture Company to a defendant herein or a person owned or controlled by or affiliated with a defendant herein but may be leased by Paramount or the New Picture Company to the New Theatre Company (or a subsidiary of the New Theatre Company) under a lease which contains no rental provisions based upon a share of the profits of the theatre so leased or any other theatre, and (b) such property shall be sold by the New Picture Company within five years from the date hereof to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein.

IV

A. Within a period not to exceed one year after the entry of this judgment the New Theatre Company and the New Picture Company shall be operated wholly independently of one another and shall have no common directors, officers, agents or employees. Each of them shall thereafter be enjoined from attempting to control or influence [fol. 207-55] the business or operating policies of the other by any means whatsoever. The foregoing provisions shall not be construed to prohibit the directors, officers, agents or employees of Paramount Pictures Inc. who become affiliated with either one of said new companies and who receive stock

in such companies, either in exchange for stock presently held by them in Paramount Pictures Inc. or as the result of the exercise of option privileges now owned by them or who receive certificates of interest in the New Theatre Company issued by the Trustee as herein provided, from so acquiring stock or certificates of interest in the company with which they do not become affiliated and holding such stock or certificates of interest for a sufficient period of time to permit them to sell such stock or certificates of interest to persons not affiliated with the seller's company without undue hardship to the seller, provided that in any event such sales shall be made within a period not to exceed one year from the effective date of the reorganization of Paramount Pictures Inc.

B. The by-laws of the New Theatre Company shall provide that a majority of its Board of Directors shall consist of individuals who have not had any prior connection with the defendant Paramount Pictures Inc., or the New Picture Company, as directors, officers, agents or employees. The names of the candidates for election or designation to the original Board of Directors of the New Theatre Company shall be submitted to and approved by the Attorney General and the Court.

C. The by-laws of the New Picture Company shall provide that all replacements of members of the Board of Directors on and after the date of reorganization of Paramount Pictures Inc. shall be filled by individuals who have not had any prior connection with the defendant Paramount Pictures Inc. or the New Theatre Company as directors, officers, agents or employees, until such time as a majority of the Board of Directors of the New Picture Company shall [fol. 207-56] consist of such individuals and such Board shall thereafter continue to have such a majority.

V

A. The defendant, Paramount Pictures Inc., shall present to its stockholders, prior to April 19, 1949, a plan of reorganization to effect a divorceement of its theatre assets located in the United States from its other assets. Such plan shall provide that one of the new companies, viz., the New Theatre Company, shall receive the said theatre assets, and the other, viz. the New Picture Company, shall receive the said other assets, and the two new companies shall each

issue to Paramount Pictures Inc. in exchange for the assets so received a number of shares of their common capital stock equal to one-half the aggregate amount of common capital stock of Paramount Pictures Inc. then outstanding. Paramount Pictures Inc. shall be dissolved and (a) shall distribute the stock of the New Picture Company pro rata among its own stockholders, and (b) shall on behalf of its stockholders transfer the shares of the New Theatre Company to, and register the same in the name of Bank of New York and Fifth Avenue Bank, a corporation organized and existing under the laws of New York, as Trustee, hereinafter called the Trustee, to hold in accordance with the terms and conditions hereinafter set forth.

B. Upon the organization of the New Picture Company, Paramount Pictures Inc. shall cause the New Picture Company to file with the Court its consent to be bound by, and receive the benefits of, the terms of sections II, IV, VI (in so far as section VI is applicable to the New Picture Company), VIII and IX of this judgment, and thereafter the New Picture Company shall be in all respects bound by, and receive the benefits of, the terms of such sections of this judgment.

C. Upon the organization of the New Theatre Company, Paramount Pictures Inc. shall cause the New Theatre Company [fol. 207-57] to file with the Court its consent to be bound by, and receive the benefits of, the terms of sections III, IV, VI, VIII and IX of this judgment, and thereafter the New Theatre Company shall be in all respects bound by, and receive the benefits of, the terms of such sections of this judgment.

VI

A. The Trustee shall declare its submission to the jurisdiction of this Court for all purposes of this cause, and shall enter its appearance herein by counsel, and is made a party hereto; and said Trustee is hereby appointed to receive and hold, as the custodian of this Court, subject to the provisions of this judgment and to the further orders and judgment of the Court herein, the shares of capital stock of the New Theatre Company which shall be transferred to it as above provided for the purpose of assuring effective separation of the ownership and control of the New Picture

Company from the ownership and control of the New Theatre Company.

B. The Trustee shall execute and issue certificates of interest representing the shares transferred to it hereunder and shall deliver them to the defendant, Paramount Pictures Inc., which shall distribute such certificates of interest, together with the shares of stock of the New Picture Company, pro rata among its own stockholders. All such certificates shall be registered by the Trustee in the names of the recipients.

C. The certificates of interest issued hereunder may be in such denominations as the Trustee shall elect. The certificates of interest shall be executed on behalf of the Trustee by such officer or officers of the Trustee as it may authorize, and such certificates of interest may be countersigned by a trust company in the City of New York as registrar.

D. The Trustee shall, so long as any of the shares of the capital stock of the New Theatre Company shall be held by [fol. 207-58] the Trustee, collect and receive any and all cash dividend declared by the New Theatre Company appertaining to the shares so held, which shall be payable to the Trustee as the registered stockholder entitled to such dividends by the terms of the declaration thereof. Such dividends shall be held by the Trustee as trustee for the respective registered holders of certificates of interest to be paid to or upon their order as hereinafter provided.

The Trustee shall as soon as practicable after receipt of each cash dividend pay to each registered holder of a certificate of interest an amount which is equal to 50% of the amount of such dividend applicable to the shares of stock represented by such certificate of interest, in order to permit the holder thereof to apply such amount toward payment of income taxes on the income deemed to have been constructively received by him by virtue of the payment of such dividend to the Trustee; provided, however, that unless at least 51% of the shares of stock of the New Theatre Company have been released by the Trustee and registered in names other than that of the Trustee within two years from the date of creation of the Trust, the Trustee shall retain 100% of the dividends thereafter paid to it by the New Theatre Company and shall thereafter pay over no part of such dividends to certificate holders as provided above.

E. At any time upon the surrender to the Trustee at its office in the City of New York of any outstanding certificates of interest by the registered holder thereof, or his transferee, and the filing with the Trustee of a duly executed affidavit, substantially in the forms annexed as "FORM A-1 through 6", the Trustee shall as soon as practicable, unless it has reason to believe that the facts are not as represented in the affidavit, deliver to such applicant stock certificates for the number of shares of capital stock of the New Theatre Company represented by the surrendered certificates of interest. The term "applicant" as hereinafter [fol. 207-59] used shall refer to a registered holder of a certificate of interest, or his transferee, who may surrender such certificate of interest to the Trustee in accordance with this or any of the succeeding paragraphs.

If at any time the number of shares of capital stock of the New Theatre Company held by the Trustee have been reduced by the conversion of certificates of interest in accordance with the preceding paragraph to $33\frac{1}{3}\%$ or less of the total number of shares of capital stock of the New Theatre Company outstanding, the Court may, upon application of the New Theatre Company, declare the trust terminated and all shares released therefrom if the Court shall first find that upon such termination there will be no working control of or controlling influence over the New Theatre Company by a person or persons affiliated with the New Picture Company, and no working control of or controlling influence over the New Picture Company by a person or persons affiliated with the New Theatre Company.

In the event of an order of the Court terminating the Trust in accordance with the preceding paragraph, it shall be the duty of the New Theatre Company promptly to notify the holders of certificates of interest; and thereafter, upon the surrender to the Trustee at its office in the City of New York of any outstanding certificate of interest by an applicant whose shares have been released by such direction or order, the Trustee shall as soon as practicable deliver to the applicant stock certificates for the number of shares of capital stock of the New Theatre Company represented by the surrendered certificate of interest.

When certificates of interest are surrendered to the Trustee for transfer and the circumstances are not such as to entitle the applicant to the issuance of a certificate for

shares of capital stock of the New Theatre Company, the Trustee shall issue a new certificate of interest in the name specified by the applicant.

[fol. 207-60] F. Upon the delivery by the Trustee of a certificate for shares of capital stock of the New Theatre Company against the surrender of an outstanding certificate of interest or upon the transfer of a certificate of interest into the name of a new registered holder, the Trustee shall pay in cash, to or upon the order of the person in whose name the surrendered certificate (or the certificate delivered for transfer) is registered, the amount of all cash dividends received by the Trustee appertaining to the number of shares represented by such certificate during the period in which such person was the registered holder of such certificate, less the amount theretofore released and paid by it in respect of the shares represented by such certificate, but without interest thereon, as well as the amount of any dividends in respect of such shares which have been declared by the New Theatre Company payable on a date subsequent to the surrender (or delivery for transfer) of the certificate of interest to holders of record on a date prior to such surrender, (or delivery for transfer).

G. The Trustee shall at any time after the end of four years from the date of the creation of the Trust, if the Attorney General so requests, and in any event not later than five years from such date, mail to each of the registered holders of remaining certificates of interest, addressed to him at the last known post office address appearing on the books of the Trustee, a notice stating that the shares of capital stock of the New Theatre Company remaining in the name of the Trustee as of a date not less than ninety days after the mailing of such notice, will be sold and the net proceeds distributed among such holders in proportion to the number of shares represented by their certificates; and as promptly as practicable after the date specified in such notice, the Trustee shall sell, in such manner as the Court shall direct, the remaining shares in the Trust to persons who are not owners of stock in the New Picture Company and upon distribution of the net proceeds (together with any [fol. 207-61] dividends in the hands of the Trustee to which the holders of the remaining certificates of interest may be entitled) the Trust shall terminate.

H. If it shall appear to the Court or the Attorney General at the time that the Trust is proposed to be terminated, as provided in subsections E or G of this section VI, that a working control of or controlling influence over the affairs of either of the two new companies is being exerted by or on behalf of a person or persons affiliated with the other such company, and the Court finds that such a working control or controlling influence exists, the Court may take such action as may be necessary and appropriate in respect of such persons to ensure the termination of such working control or controlling influence, including, but not limited to, if such persons are stockholders of either company, the suspension of their right to vote or to receive dividends upon their stock, and, if such persons are officers, agents, directors or employees of either company, their removal from such positions.

I. Any shares which may be issued by the New Theatre Company during the existence of the Trust provided for herein, shall likewise be transferred to the Trustee and be subject to the terms of this judgment unless the person to whom such shares are proposed to be issued files an affidavit in substantially the forms annexed marked "FORM A-1 through 6" with the New Theatre Company.

J. To aid the Court in the enforcement of his judgment, appropriate provisions shall be made in the charters or the by-laws of the New Picture Company and the New Theatre Company requiring that so long as the Trust provided for herein is in existence any person to whom a dividend is paid (other than the Trustee) shall have first disclosed the identity of the beneficial owner of the shares in respect of which the dividend is payable, and that, in the [fol. 207-62] event that one of such companies shall not have paid a dividend within thirty days of a dividend payment by the other, any person (other than the Trustee) to whom the dividend is paid shall also have first disclosed the extent of any beneficial ownership such person and the beneficial owner may then have in the other company. Before the Trust is terminated both of said companies will procure from all of the stockholders then of record and the transfer agents whatever additional data as to beneficial ownership may be necessary to determine accurately as of the date of proposed termination the names of all beneficial owners of stock and the amounts respectively held by them.

K. The two new companies shall make arrangements with their transfer agents for the submission to each of them, at any desired intervals, of all such information as will enable such companies to determine the name of every person who is a holder of shares (or certificates of interest) in both companies, and the number of shares (including shares represented by certificates of interest) in each company standing in his name, and such information will be made available to the Attorney General.

L. All certificates of interest surrendered pursuant to conversions or exchanges effected under this section VI shall forthwith be cancelled by the Trustee and shall not be re-issued.

Within 60 days after the conversion of certificates of interest as herein provided shall have commenced, and at monthly intervals thereafter, the Trustee shall file with the New Theatre Company a report showing the aggregate amounts of certificates of interest transferred and converted since the last previous report of the Trustee and the names of all persons to whom shares of stock of the New Theatre Company shall have been issued pursuant to every such conversion and to whom certificates of interest shall have been transferred; and from time to time upon the request [fol. 207-63] of the Attorney General the Trustee shall furnish him with any information which he may require relating to the carrying out of this judgment.

M. The Trustee shall exercise full voting rights on the shares of capital stock of the New Theatre Company registered in its name; having due regard for the interests of the holders of the certificates of interest, in accordance with the terms, conditions and purposes of this judgment.

N. The Trustee shall keep at an office maintained by it in the City of New York books for the transfer of the certificates of interest issued hereunder. The Trustee shall furnish to the New Theatre Company as and when requested lists containing the names and addresses of the holders of certificates of interest and the respective amounts held by them.

The Trustee may to enable it to effect the purposes of this judgment (so far as consistent with the provisions hereof), decide all matters of detail in respect of the form of certificates of interest and the arrangements necessary for their issuance and transfer.

The Trustee shall be accountable for its action hereunder

only in proceedings in this cause, and any order of the Court entered upon notice to the Trustee and to the New Theatre Company shall be full protection to the Trustee for any action which it may take pursuant thereto, and any action so taken by the Trustee shall be binding upon all holders of certificates of interest. The Trustee shall not be liable to anyone for deferring to take any action until instructed by the Court.

O. In case any certificate of interest issued hereunder shall become mutilated or be destroyed, the Trustee, in its discretion, may issue a new certificate of interest of the same denomination in lieu of such mutilated or destroyed certificate. In case of loss or destruction, the applicant for a [fol. 207-64] substituted certificate of interest shall furnish to the Trustee evidence of such loss or destruction to the satisfaction of the Trustee in its discretion and such reasonable indemnity as the Trustee shall require.

P. The Trustee shall be entitled to reasonable compensation, the amount thereof to be approved by the Court, for all services by it hereunder, which compensation, together with counsel fees and other expenses incurred hereunder and approved by the Court, and all stamp and other taxes imposed by law upon the transfer of the shares of the New Theatre Company from the Trustee to the holders of certificates of interest, shall be paid by the New Theatre Company.

Q. The Trustee shall be subject to removal by the Court in its discretion and, in the event of such removal, or in the event of the resignation of such Trustee, the Court may appoint a successor Trustee. The term "Trustee" as herein used shall be deemed to refer to any such successor Trustee.

VII

A. Nothing contained in this judgment shall be construed to limit, in any way whatsoever; the right of the Paramount defendants, during the period required for the completion of the reorganization of the Paramount defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Paramount Pictures Inc. has or may acquire pur-

suant to the terms of this judgment a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

[fol. 207-65] B. From and after the effective date of the reorganization of the Paramount defendants, the provision of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or Paramount Pictures Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this judgment.

VIII

A. For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this judgment, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment.

[fol 207-66] B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department

of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

IX

A. This judgment is rendered and entered in lieu of and in substitution for the decree of this Court dated December 31, 1946. This judgment shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the Paramount defendants shall not have been approved by the stockholders of Paramount Pictures Inc. prior to April 19, 1949.

B. For the purpose of any application under this judgment, the plaintiff and the defendant, Paramount Pictures Inc., hereby waive the necessity of convening a court of three judges pursuant to the expediting certificate filed herein on June 13, 1945; and agree that any application may be determined by any judge sitting in the United States District Court for the Southern District of New York.

Any application by either party under this judgment shall be upon reasonable notice to the other.

C. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this consent judgment to apply to the Court at any time for such orders or directions as may be necessary or appropriate for the construction, modification or carrying out of the same (including applications for alternative relief to accomplish termination of any joint ownership in a manner consistent with the purposes of this judgment in situations where none of the methods of terminating any such joint ownership provided in paragraph [fol. 207-67] 9 of section III of this judgment has effected such termination, due to the unreasonableness of Paramount or a co-owner), for the enforcement of compliance therewith; and for the punishment of violations thereof, or for other or further relief.

Dated: March 3, 1949.

Augustus N. Hand, United States Circuit Judge; Henry W. Goddard, United States District Judge; Alfred C. Coxe, United States District Judge.

We hereby consent to the entry of the foregoing decree.
For the Plaintiff .

**Tom C. Clarke, Attorney General; Herbert A. Bergson,
Asst. Attorney General; Robert L. Wright, Sigmund
Timberg, Spec. Assts. to Atty. Gen.**

For the Defendants

**Paramount Pictures Inc. and Paramount Film Distrib-
uting Corporation, Simpson, Thacher & Bartlett, By
Albert C. Bickford, A Member of the Firm. Their
Attorneys.**

[fol. 207-68]

"FORM A-1"

(Individual Form)

State of
County of } ss:

..... being duly sworn
deposes and says:

That deponent is surrendering a certificate or certificates of interest registered in the name of numbered , issued by , as Trustee, under a judgment entered on the day of , 1949 by a statutory three judge District Court in the suit of United States of America vs. Paramount Pictures, Inc. and others; that he is the beneficial owner of shares of capital stock of (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that he makes this affidavit for the purpose of procuring the issuance in the name of deponent of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That deponent does not own any beneficial interest in any shares of the capital stock of (herein referred to as the New Picture Company) a corporation of the State of , whether registered in deponent's name on the books of the New Picture Company or registered in the name or names of others. That deponent in making this application is not acting either directly or indirectly for or on behalf of any stockholder

of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation [fol. 207-69] ration for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in his own behalf in good faith.

Sworn to before me
this day
of 19.....

[fol. 207-70] "FORM A-2"

(Form for Joint Tenants and Tenants in Common)

State of }
County of } ss:

..... being duly sworn
deposes and says:

That deponent is one of joint tenants (or tenants in common), all of such tenants being herein referred to as the "Applicants"; that he is, pursuant to authority duly conferred on him, surrendering on behalf of Applicants a certificate or certificates of interest registered in the name of numbered, issued by as Trustee, under a judgment entered on the day of 1949 by a statutory three judge District Court in the suit of United States of America vs. Paramount Pictures Inc. and others; that the Applicants are the beneficial owners of shares of capital stock of (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of the Applicants of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That none of the Applicants owns any beneficial interest in any shares of the capital stock of (herein referred to as the New Picture Company) a corporation of the State of whether registered in his own name on the books of said New Picture Company or registered in the name or names

of others. That Applicants in making this application are [fol. 207-71] not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in their own behalf in good faith.

Sworn to before me
this day
of, 19.....

[fol. 207-72] "FORM A-3"

(Partnership Form)

State of } ss:
County of }

..... being duly sworn
deposes and says:

That deponent is a member of the partnership of , the members of which are (hereinafter called the "Applicants"); that he is, pursuant to authority duly conferred on him, surrendering on behalf of Applicants a certificate or certificates of interest registered in the name of , numbered issued by , as Trustee, under a judgment entered on the day of 1949 by a statutory three judge District Court in the suit of United States of America vs. Paramount Pictures Inc. and others; that Applicants are the beneficial owners of shares of capital stock of (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of the Applicants of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That none of the Applicants owns any beneficial interest in any shares of the capital stock of (herein re-

ferred to as the New Picture Company) a corporation of the State of whether registered in [fol. 207-73] his own name on the books of said New Picture Company or registered in the name or names of others. That Applicants in making this application are not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in their own behalf in good faith.

Sworn to before me
this day
of, 19.....

[fol. 207-74]

"FORM A-4"

(Corporate Form)

State of }
County of } ss:

....., being duly sworn
deposes and says:

That deponent is of the
a corporation (or a joint stock company), hereinafter called
the "Applicant"; that he is, pursuant to authority duly
conferred on him, surrendering on behalf of Applicant a
certificate or certificates of interest registered in the name
of, numbered, issued by
as Trustee, under a judgment entered on the day of
1949 by a statutory three judge District Court in the suit of
United States of America vs. Paramount Pictures Inc. and
others; that Applicant is the beneficial owner of
shares of capital stock of (hereinafter referred to
as the New Theatre Company) represented by said certifi-
cate or certificates; and that deponent makes this affidavit
for the purpose of procuring the issuance in the name of
the Applicant of a certificate or certificates for such shares
of capital stock of the New Theatre Company held by said
Trustee in exchange for said certificate or certificates of
interest. That Applicant does not own any beneficial interest

in any shares of the capital stock of
 (herein referred to as the New Picture Company) a corporation of the State of, whether registered in the Applicant's own name on the books of the New Picture Company or registered in the name or names of others. That the Applicant in making this application is not acting either directly or indirectly for or on behalf of any [fol. 207-75] stockholder of the New Picture Company or in concert, agreement or understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in its own behalf in good faith.

Sworn to before me
 this day
 of, 19.....

[fol. 207-76]

"FORM A-5"

(Trustee Form).

State of } ss:
 County of

..... being duly sworn
 deposes and says:

That deponent is trustee under the trust,
 that on behalf of such trust estate he is surrendering a certificate or certificates of interest registered in the name of numbered, issued by
 as Trustee, under a judgment entered on the day of 1949 by a statutory three judge District Court in the suit of United States of America vs. Paramount Pictures Inc. and others; that such trust estate is the beneficial owner of shares of capital stock of (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of the trust estate of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That such trust estate does not own any beneficial interest in

any shares of the capital stock of (herein referred to as the New Picture Company) a corporation of the State of, whether registered in the name of such trust estate on the books of said New Picture Company or registered in the name or names of others. That deponent in making this application is not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or [fol. 207-77] understanding with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in behalf of such trust estate in good faith.

Sworn to before me
this..... day
of, 19....

[fol. 207-78]

"FORM A-6"

(Form for Executors and Administrators)

State of
County of) ss:

..... being duly sworn
deposes and says:

That deponent is executor (or administrator) of the estate of; that on behalf of said estate he is surrendering a certificate or certificates of interest registered in the name of, numbered issued by, as Trustee, under a judgment entered on the day of 1949 by a statutory three judge District Court in the suit of United States of America vs. Paramount Pictures Inc. and others; that said estate is the beneficial owner of shares of capital stock of (herein referred to as the New Theatre Company) represented by said certificate or certificates; and that deponent makes this affidavit for the purpose of procuring the issuance in the name of of a certificate or certificates for such shares of capital stock of the New Theatre Company held by said Trustee in exchange for said certificate or certificates of interest. That said estate does not own any beneficial interest in any shares of the

capital stock of (herein referred to as the New Picture Company) a corporation of the State of whether registered in the name of said estate on the books of said New Picture Company or registered in the name or names of others. That deponent in making this application is not acting either directly or indirectly for or on behalf of any stockholder of the New Picture Company, or in concert, agreement or understanding [fol. 207-79] with any other individual, firm or corporation for the control of the New Theatre Company in the interest of any individual, firm or corporation affiliated with the New Picture Company, but in behalf of said estate in good faith.

Sworn to before me
this day
of 19.....

[fol. 207-80]: Paramount Pictures Inc.

Times Square, New York 18

BRYANT 9-8700 Cable Address Famfilm

February 24, 1949.

The Attorney General, Department of Justice,
Washington, D. C.

Dear Sirs:

Re: U. S. v. Paramount Pictures Inc., et al.

As per our discussions with you in connection with the consent judgment as to the Paramount defendants, the entry of which judgment is being consented to by you and by us, we set forth below our understanding of and representations as to certain matters.

(1) In connection with paragraph 2 of subsection A of section III of such judgment:

With reference to the pooling agreement in Biddeford, Maine involving the City Theatre of Louis B. Lausier and the Central Theatre of New England Theatres, Inc. (a 100% subsidiary of Paramount), New England Theatres, Inc. has brought suit against Mr.

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Lausier in the District Court of the United States for the District of Maine to terminate such pooling agreement.

With reference to the pooling agreement in Jamestown, N. D. involving the State Theatre of L. J. Ludwig, the Star Theatre of L. J. Ludwig and American Amusement Company (a 100% subsidiary of Paramount), and the Grand Theatre of American Amusement Company, American Amusement Company has brought suit against Mr. Ludwig in the District Court of the United States for the District of Minnesota to terminate such pooling agreement.

Paramount or the New Theatre Company shall cause each of the two suits above referred to to be diligently prosecuted to final judgment. During the pendency of and until the entry of a final judgment in favor of the plaintiff in each such suit, the continuation of the pooling agreement which is the subject of such suit shall not be deemed to be in violation of the said paragraph 2, nor shall it be deemed a violation of the said paragraph 2 if it shall finally be adjudged in such suit that the plaintiff is not entitled to terminate such pooling agreement.

With reference to the pooling agreement in Newburgh, N. Y. involving the Cameo and Ritz Theatres of Dora Levy and the Broadway Theatre of Paramount Pictures Theatres Corporation (a 100% subsidiary of Paramount), such agreement has been terminated by Paramount Theatres Corporation, effective May 31, 1949. The continuation of such pooling agreement until May 31, 1949 shall not be deemed to be in violation of the said Paragraph 2.

[fol. 207-81] (2) Referring to paragraph 6 of subsection A of section III of such judgment, the new theatre which our subsidiary, Florida Coastal Theatres, Inc., has an obligation to build in West Palm Beach, Fla. pursuant to an existing lease, and construction of which commenced on or about February 1, 1949 (and which theatre is being built in accordance with such obligation) is to be regarded as a wholly owned theatre to be held by Paramount or the New Theatre Company in conformity with such judgment.

(3) Referring to paragraph 7 of subsection A of section

III of such judgment, certain of our wholly owned theatres are operated and booked by the same parties who operate and book the theatres which we have in joint ownerships in the same general area. Pending the termination of the said joint ownerships as prescribed in such section III, the continuation of the foregoing arrangements is not to be considered as a violation of such paragraph 7.

(4) Referring to the four theatres in Shreveport, La., as to which Paramount or the New Theatre Company may elect to acquire the interest of the co-owner or co-owners therein as provided in sub-paragraph (b) of paragraph 9 of subsection A of section III of such judgment, at the present time a 50% interest in such four theatres is held by investors (Mrs. Rebecca M. Frank and Miss Marie Schuler). It is understood that Paramount or the New Theatre Company may, in lieu of acquiring the said 50% interest of such investors in such four theatres, hold, acquire and retain a 50% interest in such four theatres provided that such investors, or other investors, own the remaining 50% interest.

(5) Referring to the three theatres in Jackson, Miss., as to which Paramount or the New Theatre Company may elect to acquire the interest of the co-owner or co-owners therein as provided in sub-paragraph (b) of paragraph 9 of subsection A of section III of such judgment; at the present time a 50% interest in such three theatres is held by the Kennington interests who are investors. It is understood that Paramount or the New Theatre Company may, in lieu of acquiring the said 50% interest of such investors in such three theatres, hold, acquire and retain a 50% interest in such three theatres provided that such investors, or other investors, own the remaining 50% interest.

(6) We refer to certain of the theatres in Alabama, North Carolina, South Carolina and Tennessee as to which Paramount or the New Theatre Company may elect to acquire the interest of the co-owner or co-owners therein as provided in sub-paragraph (b) of paragraph 9 of subsection A of section III of such judgment. We believe that certain of the co-owners (other than officers or employees) of these theatres are investors, as distinguished from actual or potential independent exhibitors, and it is understood that,

if Paramount or the New Theatre Company satisfies you that such is the fact and if Paramount or the New Theatre Company acquires the interest of the other co-owners in some or all of such theatres, Paramount or the New Theatre Company need not acquire the interest of the investors in such theatres.

(7) In paragraph 1 of subsection C of section III of such judgment it is provided that Paramount or the New Theatre Company must dispose of one first run theatre in Chattanooga [fol. 207-82] nooga, Tenn. It is understood that Paramount or the New Theatre Company need not dispose of such theatre in Chattanooga if there shall be an independent first run theatre in such city in substantial competition with the theatres of Paramount or the New Theatre Company within eighteen months from the date of such decree and if Paramount or the New Theatre Company shall forego its plans for the construction of a new theatre in such city and notify you in writing that it waives its right to make the application in such connection referred to in paragraph 6 of subsection A of Section III of such judgment.

(8) None of the theatres to be disposed of under subsection B, and paragraph 1 of subsection C, of section III of such judgment shall be a theatre catering exclusively to colored patronage.

(9) Referring to the last paragraph in paragraph 1 of subsection C of Section III of such judgment, it is understood that you have consented to a sublease by Paramount or the New Theatre Company of the Annex Theatre, Detroit, Mich., subject to the conditions set forth in such paragraph, and that it will be unnecessary for Paramount or the New Theatre Company to obtain the approval of the Court before making such sublease.

(10) We have stated to you that we own a beneficial interest, in connection with investors only, in the following theatres:

Paramount Theatre, Ft. Fairfield, Me.

Brockton Theatre, Brockton, Mass.

Liberty and Majestic Theatres, Johnson City, Tenn.

Since there is only one theatre in Ft. Fairfield, Me. and since there is existing substantial independent motion picture theatre competition in Brockton, Mass. and Johnson City, Tenn., we are permitted to continue the existing joint

ownership with investors in each of the above listed cities and no reference has been made in such judgment to any of these situations.

(11) Referring to the list of theatres which we own in conjunction with exhibitors, as set forth in paragraph 9 of subsection A of section III of such judgment, we hereby certify to you that based upon all information furnished to us to date, this list is complete and accurate as of this date.

(12) We hereby confirm that on December 30, 1948, we terminated the existing joint ownership, and sold to our co-owner our entire interest, in the following forty-five theatres:

<i>State</i>	<i>City</i>	<i>Name of Theatre</i>
Massachusetts	Arlington	Capitol
	Greater Boston	Allston
		Bellevue
		Circle
		Colonial
		Community
		Dudley
		Egleston
		Esquire
		Egyptian
		Fairmont
		Franklin Park
		Humboldt
		Hyde Park
		Jamaica
		Liberty
		Marlboro
		Modern
		Morton St.
		Newton
		Oriental
		Plaza
		Regent
		Rialto
		Rivoli
		Roxy
		State
		Warren St.

[fol. 207-83]

<i>State</i>	<i>City</i>	<i>Name of Theatre</i>
Mass. (Cont'd)	Greater Boston (Cont'd) Falmouth Hull Somerville Taunton Waltham	Washington St. Wollaston Elizabeth Falmouth Bayside Ball Square Capitol Central State Park Central Square Embassy Waldorf Waltham Maine State Capitol
Maine	Portland	
Connecticut	New London	

(13) We hereby state to you that, based upon the most accurate information available to us there is now substantial independent first run competition in all communities over 25,000 population where theatres are wholly owned by Paramount, except those communities named in subsections [fol. 207-84] B and C of section III of such judgment and except New Haven, Connecticut, and Hammond, Indiana, where Paramount operates one theatre and Loew's and/or Warner's operate two or more theatres, and except South Norwalk and Norwalk, Connecticut, where Paramount operates one downtown theatre and one suburban theatre and Warner's operates two downtown theatres, and except Phoenix, Arizona, where Fox operates two theatres and Paramount under such judgment will dispose of its interest in a joint ownership having a downtown theatre. In all communities under 25,000 population where theatres are wholly owned by Paramount and where there are two or more theatres there are now one or more independent theatres in operation, except those communities named in subsections B and C of section III of such judgment, and except Biddeford, Maine, Newburgh, New York, and Jamestown, North Dakota where such operation will occur upon

termination of the pooling agreements referred to in (1) of this letter.

(14) With reference to the time limitation set forth in subsection A of section IV of such judgment, the following directors of Paramount Pictures Inc. may receive certificates of interest in the New Theatre Company which (if they become directors of the New Picture Company) they may not be able to dispose of within the period allowed without undue hardship, due to the large size of their holdings (to wit, presently in excess of 5,000 shares) and unpredictability of market conditions. It is understood that in such event they may, upon a showing of due diligence and upon a further showing as to the length of time necessary to complete disposal of their holdings without undue hardship, receive an extension of time for that purpose:

Maurice Newton

Stanton Griffis

A. Conger Goodyear

It is further understood that Barney Balaban, who is now an officer and director of Paramount Pictures Inc. and who will become an officer and director of the New Picture Company and who now holds certain convertible notes of Paramount Pictures Inc. will, prior to the expiration of the trust set forth in such judgment, either dispose of or exercise his option to convert such notes into stock of Paramount Pictures Inc. or dispose of or exercise warrants entitling him to purchase stock of the New Picture Company and the New Theatre Company, and that if the options or warrants are exercised by him, he will dispose of his holdings so acquired in the New Theatre Company as soon thereafter as such sale may be made without undue hardship to him and, in any event, prior to the expiration of the trust set forth in this judgment. It is further understood that such convertible notes will be paid in full not later than three months after the effective date of the reorganization.

(15) It is understood that the term "theatre assets of Paramount located in the United States" and to be transferred to the New Theatre Company as provided in such judgment includes the television station operated in Chicago, Ill., by our subsidiary, Balaban & Katz Corp.
[fol. 207-85] (16) We hereby confirm that we will forth-

with send, air mail special delivery, to all persons who are co-owners in our existing theatre joint ownership, a copy of such judgment, and advise them at the same time that such judgment will be presented to the three judge expediting court in the Southern District of New York on the date fixed by such court for such purpose.

It is understood that this letter will be incorporated by reference in such judgment and that you will thereby indicate that the contents hereof are in accordance with your understanding.

Very truly yours,
PARAMOUNT PICTURES Inc.
 by Austin C. Keough, (Sgd.)
Vice President

[fol. 208] UNITED STATES DISTRICT COURT

[TITLE OMITTED]

STENOGRAPHER'S MINUTES

New York, January 4, 1951

[fol. 208-1] UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

E. 87-273

UNITED STATES OF AMERICA, Petitioner,

vs.

LOEW's, INCORPORATED, et al., Defendants.

Before:

HON. AUGUSTUS N. HAND, C.J.,

HON. HENRY W. GODDARD, D.J.; and

HON. ALFRED C. COXE, D.J.

New York, January 4, 1951; 4:00 o'clock p.m.

APPEARANCES:

For the Government:

Irving H. Saypol, Esq., United States Attorney, by Philip Marcus, Esq.; and Maurice Silverman, Esq., Special Assistants to the Attorney General; and Harold Lasser, Esq., Special Attorney.

[fol. 208-2] Robert W. Perkins, Esq., Attorney for Defendants Warner Bros. Pictures, Inc., et al.; Joseph M. Proskauer, Esq., Robert W. Perkins, Esq., J. Alvin Van Bergh, Esq., Howard Levinson, Esq., and Harold Berkowitz, Esq., of Counsel.

B. F. Shipman, Esq., Attorney for Intervenor Sutphen Estates, Inc.

Stanleigh P. Friedman, Esq., Attorney for Warner Bros., et al.

Mr. Marcus: May it please the Court, at this time I should like to present to your Honors a proposed consent judgment as to Warner Bros. which has been signed by the parties.

This judgment, your Honors, is a lineal descendant of the judgment entered by this Court on February 8th of last year. It does contain certain provisions not included in that judgment, and it is complete in itself, but because it is complete in itself the preamble recites that it is entered in lieu of the previous judgment entered by this Court with respect to the Warner defendants. It is not intended by this recital to affect in any way the findings of fact and conclusions of law with respect to the violations found by this Court to exist in this case.

[fol. 208-3] It has a section devoted to trade practice provisions which is very similar to those contained in the previous judgment entered by this Court. The sole exception is with respect to a provision dealing with franchises.

That provision, as your Honors may recall, excepts from the prohibition against franchises, franchises made to independent exhibitors in opposition to affiliated circuits. This extends that exception to circuits created out of the divulgements provided for by this judgment and the other judgments entered in this case.

It has a section devoted to prohibitions with respect to the exhibition interests. Those prohibitions, in turn, are very similar to those contained in the Paramount judgment. The major one deals with the restrictions upon the acquisition of additional theatres by the Warner defendants.

Judge Goddard: What section is that?

Mr. Marcus: That is Section 4, and subparagraph 6 is the one I am referring to. That is on page 5 of this printed document.

In brief, that paragraph prohibits the Warner defendants from adding to its theatres it now holds during the period provided for for divorce and divestiture. It does allow them, however, to replace theatres under certain [fol. 208-4] conditions which they may have lost during this period. Thereafter, that is, after the divorce and divestiture has been completed, they may acquire additional theatres upon application to this Court and upon a showing that such acquisition will not unduly restrict competition.

The divestiture provisions start on page 7, and are rather extensive.

In order to provide competition in various towns in which Warner has theatres, the divestiture of some 55 theatres is provided for in this judgment. In addition, what we might call conditional divestiture, is provided for in a number of other localities. That pertains for the most part to situations where competition has newly come into the picture, so now that it was thought that in order to insure such competition for a period of time, namely, five years, it would be provided that in the event that competition did not survive, Warner would have to divest themselves of a theatre in that particular locality.

In certain other towns it is provided that if theatres that are independent theatres find themselves unable to procure films and are unreasonably denied an opportunity to procure films in competition with Warner, then Warner, [fol. 208-5] during this period, will have the option of either divesting a theatre or of taking product limitation.

Judge Hand: Of taking what?

Mr. Marcus: A product limitation; that is, confining themselves to 60 per cent of the product of the major distributors.

Those conditions appertain to those towns merely for a period of five years. To that extent they do add something to the previous judgments that have been entered in this court against RKO and Fox and Paramount.

Judge Hand: You mean they are an additional burden, really?

Mr. Marcus: They are an additional burden, yes, your Honor. It is provided that those previously held are required—

Judge Hand: It all depends, of course, on knowledge of the details here that we could not have without—

Mr. Marcus: Yes.

Judge Hand: —without knowledge of the negotiation that you worked out with the Warners.

Mr. Marcus: Well, these negotiations with Warner had by the Government extended over a considerable period of months. The parties went into each town and to the extent possible we attempted to compile such data with [fol. 208-6] respect to each of those towns and each of the theatres concerned, and it was on the basis of that data that these divestitures and conditional divestitures formulas were worked out.

Judge Goddard: Well, is it inconsistent with provisions of other judgments?

Mr. Marcus: No, they are not; but there are additional ones, they are not found in the other judgments.

Mr. Proskauer: That is, they are additional burdens on us.

Mr. Marcus: That is right.

[fol. 208-7] Judge Hand: Warner has burdens along certain lines and benefits along certain lines. That has been practically traded out, hasn't it?

Mr. Marcus: Yes. With respect to these conditional divestitures, they were towns where we have taken the position that something must be done, and as far as we were concerned it would have to have been either divestiture or something along those lines. That was a matter of controversy between us and the Warner people. It was a matter which if the parties had not been willing to compromise their differences it would have to be decided by this Court whether in these particular towns actual divestiture should be had.

Judge Hand: Forbidding them to go into the forbidden fruit and everything else.

I don't imagine Judge Proskauer has been wholly sacrificed by this arrangement.

Mr. Proskauer: We consented, your Honor, just to relieve this Court of the burden of deciding it.

Judge Hand: I suppose so. That is your only object in life always.

Mr. Marcus: Outside of the provisions I have mentioned

there is nothing new with respect to divestiture as contrasted with what has been provided in the Paramount judgment. There is a provision permitting Warner to [fol. 208-8] retain certain theatres in certain towns, and that is in Section 8 on Page 26. There again we looked into the competitive picture and felt that it would not unreasonably restrain competition if Warner were allowed to do so.

Your Honor, my colleague Mr. Silverman is going to discuss the divorce provisions of this decree, but before he does so I would like to raise something for your Honors' consideration.

At various times when we have appeared before this Court your Honor has indicated that it has thought that it has been a considerable burden upon this Court for the parties to keep bringing up matters arising from the enforcement of these judgment before this Court. We have discussed this matter with Warner, and the judgment contains a provision similar to that in the Paramount decree, to the effect that the parties waive the necessity of convening a court of three judges and agree that any application may be determined by any judge sitting in the United States District Court for the Southern District of New York.

I would like to go a little further and suggest for your Honors' consideration the possibility of your Honors discussing with Judge Knox the possibility of having a judge, one judge, assigned to take care of matters which might arise in connection with the enforcement of this judgment. [fol. 208-9] In that wise your Honors would be relieved of the burden and at the same time the parties would have some assurance that there would be one particular Judge familiar with this rather complex case.

Now, one other matter. Your Honor, I understand there is—

Judge Hand: What clause is in here about this?

Mr. Marcus: There is a clause providing that the parties waive the necessity of convening this Court and may present their problems before any Judge in the Southern District. But the further point I am making is that we and Warner feel that it would be more conducive to a determination of the problems which may arise in connection with

this judgment if one particular Judge was assigned to take care of any problems that might arise.

Judge Hand: What they will try to do if you do not do that will be to land this on Judge Goddard in some way, and I know perfectly well he does not want to stay with this.

Mr. Proskauer: I was going to nominate him, your Honor.

Judge Hand: What is that?

Mr. Proskauer: I was going to nominate him for the accolade. He knows more about it.

Judge Hand: I expect you would. I would too, if I were in your place.

[fol. 208-10] Mr. Marcus: Well, that is a matter of course for your Honors' determination. We are just making that suggestion because we realize that there will be problems arising.

Judge Coxe: I am not at all sure that the alternative suggestion is a practical one. Theoretically I do not think that the Chief Judge has any authority to designate one particular Judge to one particular proceeding or case at all times. That has not been the understanding throughout the time that I have been on the District Court.

The statute, as I recall it, merely says that the Judges shall divide up the business and time among themselves; and usually at the beginning of each year we have done that: each member of the Court goes in for one month into a particular part. And here recently there has been some controversy as to assignment of Judges.

So I am wondering whether it would be possible to take one particular Judge and then have him designated or assigned, as you say, for all time by the Chief Judge.

Mr. Marcus: Well, that, of course, your Honor, I certainly don't know, but I do know that the by-laws provide or involve any judgments.

Judge Hand: I am inclined to agree with you on that.

Judge Coxe: By custom I think it should be done.

[fol. 208-11] But the other alternative, of course, seems to be that if there is to be an order or a motion submitted, that the person who is making the application would want to pick out particular Judges that he wanted to have hear it. That is as it stands now from what you say is in the proposed decree.

Mr. Marcus: That is right, or if the time were such—

Judge Coxe: It would be, of course, better to have any such motion or application made before the Motion Judge, just as we did I remember at one time about twenty years ago with respect to reorganization proceedings, but it did not get by the Supreme Court of the United States as you may recall.

Mr. Marcus: Your Honor, I understand that there is a motion for intervention in this case.

Now, the Government and Warners both oppose this motion and after your Honors have heard the attorney for the would-be intervenor I would like to be heard with respect to that motion.

Judge Hand: All right.

Mr. Silverman: If your Honors please, as Mr. Marcus stated, I am going to confine myself to the provisions of the judgment dealing with the divorceement.

The judgment provides that within ninety days Warner [fol. 208-12] Brothers Pictures, Inc. is to present a plan of reorganization to its stockholders which is to provide for the transfer of its exhibition assets to a new theatre company; for the transfer of its production and distribution assets to a new picture company, and for the dissolution of Warner Brothers Pictures.

The stock of the two new companies is to be distributed pro rata among the present stockholders of Warner Brothers Pictures. This is to be done within a period of twenty-seven months, after which reorganization the two new companies are to be operated wholly independently of each other. They are to have no common officers, directors, agents or employees, and each is enjoined from attempting to influence the business or operating policies of the other in any way.

Judge Hand: Well, this is practically the same as in the Paramount and RKO cases, isn't it?

Mr. Silverman: And RKO.

Judge Hand: And the Pullman Company formula, isn't it?

Mr. Silverman: Well, with respect to the formation of the two new companies it is what was done in the Paramount and RKO.

Judge Hand: Yes.

Mr. Silverman: Now, with respect to the way we assure [fol. 208-13] that there will not be common control, I think what is being done is similar to what was done in RKO rather than what was done in Paramount.

Control over Warner Brothers Pictures is held by the three Warner brothers by virtue of their ownership and ownership by certain members of their families of approximately 24 per cent of the outstanding common stock of Warner Brothers Pictures which excludes treasury stock.

The Warners are required by the judgment to use their best efforts to dispose of the stock received by them and their families in one or the other of these two new companies within 27 months, and the disposition is to be made to a purchaser who is not a stockholder in the other company who is not a defendant in this case, or who is not a defendant in any antitrust case brought by the Government relating to the production, distribution or exhibition of motion pictures against whom a judgment has been entered, and which is not owned or controlled or affiliated with any such defendants, or with the company resulting from divorce provided for in the judgments entered in this case.

Now, if the best efforts of Warner Brothers to sell their stock does not result in a sale within 27 months, the stock is to be deposited with a trustee designated by the Court until the stock of the three Warner Brothers and their [fol. 208-14] families is disposed of. The trustee will—

Judge Hand: You mean all of the stock of the Warner Brothers is to be so deposited?

Mr. Silverman: Is to be deposited; that is, the stock in the company in which they elect to remain is to be deposited with the trustee.

Judge Hand: Yes.

Mr. Silverman: And the trustee will exercise voting powers with respect to that stock. However, the obligation of Warner Brothers—

Judge Hand: That is just about as I member it like RKO, isn't it?

Mr. Silverman: Like RKO, that is correct, your Honor. The obligations of the Warner Brothers to use their best efforts to dispose of the stock does continue, however, after the stock has been trusted. The other terms and conditions of the trust are to be prescribed by the Court.

The three Warner brothers must elect in which company they will retain their interest as a family entity. This means that one of the Warner brothers could not elect to retain his interest in one of the new companies while the other two brothers elected to retain their interest in the other two new companies. They all have to remain in the same company.

[fol. 208-15] The judgment provides that the new picture company cannot engage in the exhibition business and that the new theatre company cannot engage in the distribution business except with Court approval after a showing that any such engagement will not unreasonably restrain competition in the distribution or exhibition of motion pictures.

Now that provision was contained in the judgment of this Court which was entered last February.

There are also provisions in the judgment which are designed to prevent the new theatre company from being controlled by any other theatre circuit, and to prevent the new picture company from being controlled by any other distribution company.

Thus the by-laws of the new theatre company are to provide that a person affiliated with any other motion picture theatre circuit cannot be elected an officer or director until he has been approved by the Attorney General and by the Court.

And it is further provided that in no event can an officer or director of the new theatre company be affiliated with a theatre circuit which has been a defendant in any antitrust case brought by the Government relating to the production, distribution or exhibition of motion pictures.

The by-laws of the new picture company are to provide that a person who is an officer, director, agent, employee [fol. 208-16] or substantial stockholder in any other motion picture distribution company cannot be elected an officer or director.

I think this provision is a new one which is not contained in the Paramount or RKO judgment.

Judge Hand: Yes.

Mr. Silverman: Those I believe are the principal provisions dealing with the divorcement of the Warner Brothers exhibition business from its production and distribution business.

Judge Hand: Now, this raises a question in my mind. Assume that the Warners went into production and not exhibition, just for the purposes of argument, then what would be the limits of their power? They could not affiliate with any circuit?

Mr. Silverman: The exhibition company?

Judge Hand: Yes, I am assuming that the Warners went into a production company.

Mr. Silverman: Well, of course, the safeguards—the purchaser to which the Warner Brothers could sell their stock is limited, and they could not sell their stock to any other circuit which was a defendant in an antitrust case relating to the production and distribution of motion pictures, and they could not sell their stock to another defendant in this case. They could not sell it to a stockholder [fol. 208-17] in the other companies, so that the affiliation which we are trying to break up could not be reformed, and they could not affiliate with another theatre circuit formed as a result of the divorcement provided for in judgments entered in this Court, so that an affiliation between this new theatre company and a united Paramount Theatres, for instance, could not take place with United, as it would be an inelegible purchaser.

Judge Hand: The people they can't deal with are former defendants and that is about all, isn't it?

Mr. Silverman: Well, former defendants in addition to any defendant in an antitrust suit brought by the Government relating to the production, distribution, or exhibition of motion pictures and against whom a judgment has been entered.

Judge Hand: Yes.

Mr. Silverman: So that with respect to any other theatre circuit against whom there has been a judgment entered, they would not be an eligible purchaser.

And then there is this provision that I referred to on page 28, Section 7(b), which provides that the by-laws of the new theatre company shall provide that a person affiliated with any other motion picture theatre circuit cannot be an officer or director of the new theatre company unless he is approved by the Attorney General and the Court.

[fol. 208-18] And it further provides that in no event can an officer or director of this new theatre company be

affiliated with a circuit which has been a defendant in an antitrust suit brought by the Government relating to the production, distribution, or exhibition of motion pictures.

Those are safeguards against the common control of the new theatre company with certain other theatre circuits.

Judge Hand: Well, I don't know how much that limits them. I suppose they know about it and you know.

Mr. Silverman: Well, we would hope that there would not be any integration with another substantial theatre circuit, and many theatre circuits are ineligible purchasers that control that stock.

Judge Hand: How are they going to do it? Have the purchaser some kind of—

Mr. Proskauer: I can't quite hear your Honor.

Judge Hand: How are they going to accomplish it? Have the purchaser some outfit that they organized with a view to this thing, and that has been free from these former commitments?

Mr. Silverman: Well, who the purchaser will be I don't know, of course, your Honor.

Judge Hand: Of course you don't know who the pur-[f. 208-19] chaser would be, but we are thinking about what kind of purchaser they could get.

Mr. Silverman: Well, of course, the purchaser would have to be someone who is eligible under the judgment, and the judgment does limit the eligible purchasers, but, of course, that is necessary.

Mr. Marcus: I would like to make one further comment with respect to your Honor's question, and that is that there is a prohibition which is contained in this judgment of divestiture provisions, and I believe perhaps in the Paramount judgment there is also a provision which prohibits the theatre circuit from acquiring any other theatre without permission of this Court, and that, of course, would apply in the event that they wanted to affiliate with a circuit theatre, so that they would have to come to this Court.

Judge Hand: Do you want to say anything, Judge Proskauer?

Mr. Proskauer: Why, your Honor, we have signed the consent to this decree which is described as a lineal des-

cendent of your Honors' judgment, so we don't raise the question of legitimacy.

Judge Hand: All right. Now, what about this motion or this order to show cause?

Mr. Shipman: If I may hand up an original and three [fol. 208-20] copies (handing to Clerk).

I think perhaps it is unnecessary to say, your Honors, that I am not here by invitation. I have already had evidence of a little cold shoulder, but we find ourselves in a situation which I feel in the interest of my client it was necessary to bring to the attention of the Court.

My client, Sutphen Estates, Inc., is the owner of the very valuable real estate property on which the Trans Theatre is located at 47th Street and Broadway. That theatre property is under a lease to a subsidiary of Stanley Theatre Company, which in turn is a subsidiary 99 per cent of Warner Brothers Pictures, Inc., the top company in this Warner organization.

Under the decree which is proposed to be entered the properties of the Warners organization are to be transferred to theatre properties, to one actually created corporation, and all other assets to another of those corporations in exchange for all of the shares of capital stock of the two new companies, those shares in turn to be distributed by the top company to its sales of top company by the decree.

[fol. 208-21] The lease, which is a 98-year lease, entered into in 1928, is guaranteed by the top company, Warner Bros. Pictures, Inc., which is to be dissolved as a result, therefore, of this decree.

Judge Hand: That is your lease?

Mr. Shipman: That is our lease, guaranteed by the company which you are decreeing shall be dissolved. Our guarantee, therefore, is destroyed.

Now, we think the rule is quite clear that if this transfer was a voluntary transfer to a corporation in exchange for its stock and all of that stock was then distributed to stockholders, that transferee corporation would, by operation of law, be personally obligated for all of the liabilities of the transferor corporation.

That analogy, I think, passes right through this whole plan.

We think also the law is that in a situation of this kind

the Court, when it decrees the destruction of our guarantee, has a responsibility to us to provide that we shall have a judicially ascertained equivalent therefor. We think the judicially ascertained equivalent therefore should be the guaranteed obligations of a transferee corporation.

Now that, in very short, is our position. We do not think it is necessary, and I want to say at the outset that we do not think it is necessary to disturb this decree which [fol. 208-22] you are about to enter. It may be that we are here prematurely, but it seemed to us important to bring to the attention of the Court at our earliest opportunity the situation that we are confronted with.

Now I would like to make a request and then I would like to make a practical suggestion.

In my motion papers I would like to make a slight amendment in order to raise a constitutional question under the Fifth Amendment. Second, I would like to suggest this: This is an extremely important matter for my client, requires a fuller presentation than I can make at this time. We have been invited by Mr. Perkins, of Warner Bros., to confer with them. I have talked with Mr. Timbourg of the Antitrust Division, and my suggestion, if it is acceptable, is that this motion be adjourned for three or four weeks, to see if we can work out a satisfactory solution.

Now, what is going to happen from hereon, I assume, is that the Warner people are going to be preparing a proxy statement. That proxy statement will have to set forth in considerable detail what they propose to do with the assets, how they propose to take care of the liabilities of these companies. They will be confronted with this problem, will have to meet it and will have to solve it. [fol. 208-23] We may be of assistance in solving it.

So that my practical suggestion is that this matter be deferred for three or four weeks, adjourned to see if we can arrive at a solution.

The amendment that I am proposing is the addition to paragraph 12 of the following additional language: "and intervenor will be deprived of his property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States."

I have a page which can be substituted if that informality can be accepted, without necessity of a formal application.

Judge Hand: Now we will hear Mr. Marcus.

Mr. Marcus: May it please the Court, for the very reason that Warners are preparing a proxy statement to be submitted to their stockholders and I believe that the stockholders' meeting has been set for February, I do not believe that action on this motion should be relegated to the future. The would-be intervenor in this case is apparently attempting to convert this from a public antitrust case to a private antitrust case. This is a converse of what occurred at the time the Paramount judgment was [fol. 208-24] entered. At that time Mr. Russell Hardy, on behalf of a lessee of some theatre in California, a lessee from Paramount—Paramount was the lessor—attempted to intervene, and your Honors denied that intervention. Here we have a lessor attempting to intervene.

Actually what the intervenor is attempting to do is to supersede both the State laws and the Federal laws, as we understand them, with respect to the power to dissolve a corporation. The position the landlord is taking apparently is that dissolution cannot be decreed unless there is a condition providing for his special circumstance. I suppose he would maintain that position whether or not conditions were met for dissolution under the State law, and certainly he has maintained that position; although conditions have been met under the Federal law for dissolution, and I refer to the Sherman Act.

He has referred to an amendment to his petition whereby he raises the Fifth Amendment to the Constitution. Now, I do not have the cases at hand that have dealt with this problem, but there have been cases, Supreme Court cases, which have dealt with this problem and have flatly denied that there is a constitutional question, and have held that the Court has the power, in order to bring about competition, to dissolve corporations and to affect the underlying [fol. 208-25] interests. And this is apparently what is happening here.

Furthermore, as I understand it, there is not even equity in this situation. There are apparently three corporations involved, aside from the intervenor; the immediate lessee is one corporation, and then we have the Stanley corporation, which is a Warner corporation, and then we have the Warner Pictures Corporation guaranteee-

ding the obligation of the lessee. As I understand it, what is contemplated by Warner is that there will be a third corporation created, a new theatre corporation, and its obligation as guarantor will be substituted for the present picture company which will be dissolved. So you will again have three corporations apparently on this lease. The intervenor would have the fourth corporation, the picture company.

Now we are unalterably opposed to that because the very purpose of this judgment is to effect a complete separation of the picture company from the exhibition interests and the exhibition company from the distribution and production interests. To put the picture company in the position of a guarantor of a theatre is to give it an interest in the success of that theatre and to give it an interest in the exhibition business. Furthermore, I believe, and of this I am not quite certain, that Warners has other situations similar to this one, and this would merely be an [fol. 208-26] invitation for other persons to come in.

Judge Hand: There must have been a great many situations like this in this case.

Mr. Proskauer: Why, of course.

Mr. Marcus: I assume there are.

Judge Hand: And I told the applicant that I had no idea we would grant any intervention. We never have.

But what have you got to say?

Mr. Proskauer: I have just this to say. This idea of a practical solution by adjournment is quite out of the question. Our annual meeting is coming in February and we have to go ahead with this thing.

Mr. Shipman stated the answer to his own client when he said he was premature. What you are doing is to order the separation of these companies and a dissolution. We have to dissolve under the provisions of the State statute. And every State in its provisions about dissolution has provisions for taking care of such contingent obligations. In most States the provision is that reasonable provision has to be made, and if that is made the guarantee is taken care of. Here there would not be any question; the assets of this theatre company are enormously more than enough to give Mr. Shipman's client every assurance.

[fol. 208-27] But the point I am making is that if this

Court is going to allow everybody to intervene that has a claim like that and try to settle everyone of those claims which properly can be asserted, even if no good can come of it, in a State dissolution proceeding, why, this Court is hamstrung and we can't ever get ahead.

So my final answer to Mr. Shipman is that he is right when he said he is premature. He is crying before he is hurt. And when we begin our dissolution proceedings under the State statute he has every opportunity to be properly taken care of.

Mr. Shipman: May I say just one word more? While I appreciate that this client takes the familiar form of plans that have already been approved, I think there was no comparable situation to this in either the Paramount case or the RKO case.

Judge Hand: We shall have to deny this application.

Mr. Shipman: May I ask that it be denied without prejudice to another application, if you find we are hurt?

Judge Hand: No, you have got your proper remedies in these dissolution proceedings at other times.

Judge Goddard: Doesn't the State law provide that?

Mr. Shipman: The Supreme Court of the United States [fol. 208-28] has indicated in a case quite similar to this with a mortgage obligation in an antitrust case to recover property of two companies which had to be separated, that the Court was bound to judicially ascertain an equivalent substitute, and did so in an opinion by Chief Justice Taft in 259 U.S.

Judge Goddard: How do you know that you won't receive complete protection?

Mr. Shipman: I don't know what complete protection is. We now have a guarantee of a company with all of the assets of the Warner organization behind it. The proposal now is that we take a guarantee of the new theatre company which is to have the theatre assets only, after many of the theatres have been divested. Presumably there will be a quid pro quo for them, but I do not have the equivalent of the guarantee we now have, when we are asked to take the guarantee of the theatre company only.

Judge Hand: I don't know whether you will or not.

Judge Coxe: With an employee of the Warner Company who had a contract for five years, wouldn't the same problem arise?

Mr. Shipman: I think it is very simple; in a situation of that kind, to find that the employee ordinarily, the employee who has to be dealt with, is an employee of the subsidiary company, and in that situation is very easy [fol. 208-29] to deal with, as are contracts of talent and so forth. Those are usually a short term. Here is a contract which still has 76 years to run, with an aggregate obligation in cash, rent and security of twenty-three million and a half thousand dollars.

Judge Hand: But you could have questions of leases, you could have all kinds of things. There are innumerable things that are affected by this order.

Mr. Shipman: It would seem to us that the time to apply for this relief was at the time when our guarantee is destroyed by the Court, not at a subsequent time when we may be charged with not having raised the point when we should have.

Judge Hand: Now do I understand that this—

Mr. Shipman: And in answer to the Government—

Judge Hand: —consent judgment as to the Warner defendants now lets out this Court as a three-judge court? Is that right?

Mr. Marcus: It does, your Honor. It gives the parties the right to make their application to one judge of this court.

Mr. Shipman: May I say just one more word? The Government is wrong in thinking that we are opposing dissolution. I don't think we would be in a position to oppose dissolution on the signing of this decree. That [fol. 208-30] is not our position.

Judge Hand: I don't think it is. I think your position is a careful position, made in the best of good faith, but I just don't think you can protect yourself in this way.

Mr. Shipman: I think it comes squarely within Rule 24. The Court is distributing property within its control, and we are adversely affected.

Judge Goddard: Three of these are to be signed, is that right?

Mr. Marcus: Not all three have to be signed, your Honor. I suppose just the one that has been entered. We thought that we would submit three signed copies to the Court.

Judge Hand: I feel we can say on behalf of Judge Bright, who used to be in our Court and who died two

years ago, unfortunately, that we have had splendid co-operation in this thing from the lawyers from the Government and from the lawyers for the defendants. We have been very fortunate to have such an extremely complicated mess of a case in the hands of people who knew their business.

The Clerk: This Court now stands adjourned.

[fol. 209] UNITED STATES DISTRICT COURT

Equity No. 87-273

ORDER

[TITLE OMITTED]

This Court having on January 4, 1951, directed the entry of a Consent Judgment as to the defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation and it having been provided in Section 1 of said Consent Judgment: "This judgment shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the Warner defendants shall not have been approved by the stockholders of Warner Bros. Pictures, Inc. within ninety (90) days from the entry of this judgment. Upon said approval by the stockholders this cause shall be severed and terminated against the Warner defendants as of the date of this judgment," and it having been provided in Section VI of said Consent Judgment that: "The defendant, Warner Bros. Pictures, Inc., shall present to its stockholders not later than ninety (90) days after the entry of this judgment, a plan of [fol. 210] reorganization to effect the divorcement of its theatre assets located in the United States from its production and distribution assets."

Now, on reading and filing the annexed affidavit of Edward K. Hessberg, sworn to on March 1951, from which it appears that the said proposed reorganization was approved by the stockholders of Warner Bros. Pictures, Inc. prior to April 4, 1951, it is

Ordered, Adjudged and Decreed that the above entitled action be and the same hereby is severed and terminated as against the defendants Warner Bros. Pictures, Inc., Warner Bros. Picture Distributing Corporation and Warner Bros. Circuit Management Corporation as of the 4th day of January, 1951.

Dated, New York, N. Y., March 1, 1951

/S/ Augustus N. Hand, United States Circuit Judge;
/S/ Harry W. Goldard, United States District Judge; /S/ Alfred C. Coxe, United States District Judge.

[fol. 211]

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Edward K. Hessberg, being duly sworn, deposes and says:

I am and have been for many years an Assistant Secretary of the defendant Warner Bros. Pictures, Inc. The annual meeting of the stockholders of Warner Bros. Pictures, Inc., was duly called to take place on February 20, 1951. One of the purposes of the meeting was to vote on the proposal to approve a Plan of Reorganization submitted pursuant to the provisions of the Consent Judgment dated January 4, 1951. Due notice of such meeting was given to all stockholders and the meeting was duly held on February 20, 1951.

At that meeting, 5,079,833 shares of the stock of Warner Bros. Pictures, Inc., constituting 75.01% of the outstanding common stock of the Corporation as of the close of business on January 4, 1951 (excluding 523,000 shares held [fol. 212] in the Treasury) were duly voted in favor of approving the Plan of Reorganization. 41,579 shares of such stock, constituting .61% of such outstanding common stock, were voted in opposition to the approval of the Plan of Reorganization.

Therefore, the proposed reorganization of the Warner defendants has been approved by the stockholders of

Warner Bros. Pictures, Inc. prior to April 4, 1951, as required by Sections I and VI of the said Consent Judgment.

Sworn to before me this 1st day of March, 1951.

Edward K. Hessberg.

Anna G. Krasner, Notary Public State of New York, qualified New York County, 31-2194300. Cert. Filed N. Y. County Register. Term expires March 20, 1951.

[fol. 213] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 214-216] SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 668

DESIGNATION OF POINTS INTENDED TO BE RELIED UPON AND
PARTS OF RECORD TO BE PRINTED.—FILED

MAY 19, 1951

Pursuant to Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, Appellant for its definite statement of the points on which it intends to rely incorporates by reference its assignment of errors filed herein dated March 2, 1951, and designates as the parts of the record which it thinks necessary for the consideration thereof those parts of the record enumerated in its praecipe for transcript of record filed herein dated March 7, 1951.

Bertram F. Shipman, 40 Wall Street, New York,
N. Y., Counsel for Appellant.

Proof of service omitted.

[fol. 217] SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 668

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE
PRINTED.—FILED MAY 28, 1951

Pursuant to Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, Appellees designate as the additional parts of the record which they think material those parts of the record enumerated in their designation of additional portions of the record desired to be included filed herein dated April 5, 1951.

Joseph M. Proskauer, R. W. Perkins, 321 West 44th Street, New York 18, N. Y., Counsel for Warner-Appellees.

[fol. 218] SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 668

ORDER—MAY 14, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to affirm is postponed to the hearing of the case on the merits and the case is transferred to the summary docket.

Mr. Justice Jackson and Mr. Justice Clark took no part in the consideration or decision of this question.

[Endorsed on cover:] File No. 55,174. U. S. D. C., Southern New York Term No. 25. Sutphen Estates, Inc., Appellant, vs. The United States of America, Loew's Incorporated, Warner Bros. Pictures, Inc. Filed April 9, 1951. Term No. 25, O. T. 1951.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. 668 25

SUTPHEN ESTATES, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

BERTRAM F. SHIPMAN,
Counsel for Appellant.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Equity No. 87-273

SUTPHEN ESTATES, INC.,

against *Petitioner-Appellant,*

UNITED STATES OF AMERICA,

AND *Plaintiff-Appellee,*

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION (FORMERLY KNOWN AS VITAGRAPH, INC.), WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., AND UNITED ARTISTS CORPORATION,

Defendants-Appellees

**STATEMENT AS TO JURISDICTION SUBMITTED
WITH PETITION FOR APPEAL**

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Sutphen Estates, Inc., Petitioner-Appellant in the above entitled cause (here-

inafter called Appellant), submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction upon appeal to review the judgment and order of the District Court complained of.

The action was brought by the United States to enjoin violations of the Sherman Act by defendants in connection with their production, distribution and exhibition of motion pictures. The trial by a special three-judge court appointed pursuant to the Expediting Act (15 U. S. C., Sec. 28) resulted in a decision that defendants had violated the antitrust laws (*U. S. v. Paramount Pictures, Inc., et al.*, 66 F. Supp. 323 (1946)) and a final decree was entered December 31, 1946. *United States v. Paramount Pictures, Inc., et al.*, 70 F. Supp. 33 (1946). On direct appeal the Supreme Court affirmed in part and reversed in part (*U. S. v. Paramount, et al.*, 334 U. S. 131 (1948)). After remand and further proceedings in the District Court, its decision was handed down (*U. S. v. Paramount Pictures; Inc., et al.*, 85 F. Supp. 881 (1949)) and the final decree was entered February 8, 1950.¹ On direct appeal said final decree was affirmed without opinion (*Loew's Inc., et al., v. U. S.*, 339 U. S. 974 (1950)).

Thereafter a consent judgment formulated by the United States and the Warner defendants² was made January 4, 1951 and entered January 5, 1951, which states in its opening sentence "This judgment is rendered and entered in lieu of and in substitution for the decrees of this Court dated December 31, 1946, as amended, and, February 8, 1950." A motion by Appellant to intervene, which was heard on January 4, 1951, was denied prior to the signing

¹ Prior to this decree, the Paramount defendants and the RKO defendants entered into Consent Decrees and the cause was severed as to them.

² Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation.

of said Consent Judgment on said date. The formal order denying said motion to intervene was made and entered February 26, 1951. The appeal is from said Consent Judgment and said Order.

The District Court rendered no opinion on the signing of the Consent Judgment or in denying Appellant's motion to intervene.

Statutory Provisions Conferring Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal said Consent Judgment and said Order denying Appellant's motion for leave to intervene, is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C., Sec. 29), which provides:

“In every civil action brought in any district court of the United States under any of said Acts (including sections 1 and 2 of the Sherman Anti-Trust Act) wherein in the United States is complaining, an appeal from the final decree of the district court will lie only to the supreme court.”

and Title 28, United States Code, Sec. 2101, which provides in part:

“(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days, if final.”

The following cases support the jurisdiction of the Supreme Court to review on direct appeal the Consent Judgment and Order herein: *U. S. v. California Canneries*, 279 U. S. 553, 557-560 (1929); *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 176-178 (1948); *Missouri-Kansas*

Pipe Line Co. v. United States, 312 U. S. 502, 505-508 (1941).

In the *California Canneries* case it was held that the Expediting Act conferred exclusive jurisdiction upon the Supreme Court to hear an appeal from the denial of a motion for leave to intervene in an antitrust action.

In the *Paramount Pictures* case (which is the decision on the first appeal of this cause) the Supreme Court entertained a direct appeal from the denial by the District Court of a motion for leave to intervene as of right and affirmed the order.

Statutes and Rules Involved

The Sherman Antitrust Act of July 2, 1890, as amended (15 U.S.C., Secs. 1, 2 and 4) reads in part:

“§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. ***

“§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, ***

“§4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 13 of this title.”

Appellant's motion for leave to intervene was based on Rule 24(a) of the Federal Rules of Civil Procedure which reads in part:

“(a) Intervention of right. On timely application anyone shall be permitted to intervene in an action:

• • • (2) when the representation of the applicant's

interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court, or an officer thereof."

and also upon Rule 24(b) of the Federal Rules of Civil Procedure which reads in part:

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

and upon the due process clause of the Fifth Amendment to the Constitution of the United States:

"No person shall be * * * deprived of life, liberty, or property without due process of law; * * *"

Dates of Judgment and Order and Petition for Appeal

The appeal is from the Consent Judgment herein made January 4, 1951 and entered January 5, 1951, and from the order denying Appellant's motion for leave to intervene made and entered on February 26, 1951.

The petition for appeal herein was filed March 2, 1951.

The Nature of the Case and the Rulings of the Court

(a) The Consent Judgment:

The Consent Judgment of January 4, 1951 requires defendant Warner Bros. Pictures, Inc. (hereinafter called Warner) to submit to its stockholders a plan of reorganiza-

tion to effect divorcement of its theatre assets from its production and distribution assets, which plan should provide that (a) all of its theatre assets should be transferred to a new Theatre Company, (b) all of its production and distribution assets should be transferred to a new Picture Company, (c) all of the common capital stock of the two new companies should be distributed to the stockholders of Warner in exchange for the assets so transferred to them, and (d) Warner should thereupon be dissolved.

(b) *Contract of Guaranty between Warner and Appellant.*

Appellant is the lessor under a lease dated December 31, 1928 to Stanley Mark Strand Corporation, an indirect subsidiary of Warner. The lease covers premises on the northwest corner of Broadway and 47th Street in the City of New York, together with the buildings thereon, including the well-known Strand Theatre. The lease is for a full term of approximately 98 years ending December 31, 2026. Current cash rental (which is subject to increase in the successive specified periods of the term) is at the rate of \$300,000 per annum and in addition the tenant is obligated to pay taxes, water rates and other charges assumed by the tenant. The lease, as amended, includes an obligation by the tenant to alter and improve the present buildings (in a manner specified in the lease) at or prior to the expiration of the term of the lease, at an estimated cost of \$1,000,000 and provides that the tenant shall pay to the lessor (Appellant) \$100,000 a year for ten years beginning December 15, 1948, to be deposited by the lessor in a separate trust account as security against default of the tenant with respect to such obligation.

All obligations of the tenant under the lease as amended are unconditionally guaranteed by Warner, which owns more than 90% of the capital stock of Stanley Corporation of America which, in turn, owns all of the capital stock of

Stanley Mark Strand Corporation, the tenant. The minimum cash obligation of the tenant under the lease for the balance of the term (approximately 76 years), and therefore the contingent cash liability of Warner as guarantor, is more than \$23,000,000. Said guaranty of Warner is a valid subsisting obligation unrelated to any antitrust violations by Warner or any other defendant in this cause.

Learning of the proposed Consent Judgment and that it was to be brought on for hearing on January 4, 1951, Appellant sought by motion (brought on by an order to show cause returnable on the same day) to intervene in said cause for the purpose of asserting its claim under said guaranty, assuring its preservation and obtaining relief against its destruction or impairment, either by an appropriate provision in the Consent Judgment or by separate order made and entered in this cause.

Appellant's motion was heard during the hearing on the Consent Judgment, the District Court announced its decision denying the motion and the Consent Judgment was thereupon signed and the formal order denying Appellant's motion to intervene was made and entered on February 26, 1951.

(c) Effect of the Consent Judgment on the Guaranty Contract.

That effect is direct and ruinous. Upon the transfer of Warner's assets to the two new companies in exchange for their capital stock to be distributed to Warner's stockholders, Warner, the guarantor, will be rendered insolvent and upon the dissolution of Warner the guaranty contract will be destroyed.

The District Court's final decree of February 8, 1950, affirmed by the Supreme Court, did not require such a reorganization as that included in the Consent Judgment, nor a dissolution of Warner. It merely required a divorcement

of Warner's theatre business from its production and distribution business. Warner's selection of the particular plan, from among numerous alternative methods of complying with said decree, was presumably because it was considered most advantageous economically to the stockholders of Warner as a tax-free reorganization.

Under settled doctrine, if the reorganization were voluntary the two transferee corporations would be liable for the obligations of Warner, since the result would be merely a reincorporation of Warner into two new corporations having identical stockholders. *Calvin v. Washington Properties*, 121 F. (2d) 19, 25 (C.A.D.C., 1941); *Pearce v. Schneider*, 242 Mich. 28; 217 N.W. 761 (1928); *Bankers Trust Co. v. Hale & Kilburn Corporation*, 84 F. (2d) 401 (C.A. 2nd, 1936); *Northern Pacific Ry. v. Boyd*, 228 U.S. 482, 502-503 (1918); *Male v. Atchison, Topeka & Santa Fe Ry. Co.*, 230 N.Y. 158, 165 (1920).

The Court of Appeals of New York has held that the transfer by Paramount Pictures, Inc. of all of its assets to two new corporations organized pursuant to a plan of reorganization required by the Paramount Consent Decree in this cause was not voluntary and therefore stockholders of Paramount were not entitled to have their stock appraised under Section 21 of the Stock Corporation Law of New York. *Kokel v. Paramount Pictures, Inc.*, 300 N.Y. 685 (1950).

But even if the transfers were voluntary, since Warner's guaranty obligation is contingent, and the guaranteed lease has some 76 years to run, Appellant is left not only without a guaranty but without any adequate remedy.

The Questions Involved Are Substantial

1. Appellant's Right to Intervene.

In its motion papers Appellant claimed intervention as of right under clauses 2 and 3 of Rule 24(a) of the Federal

Rules of Civil Procedure and also under the due process clause of the Fifth Amendment of the Constitution of the United States.

(a) *The representation of Appellant's interest by existing parties is inadequate and Appellant is or may be bound by the Consent Judgment.*

Warner presumably represents its stockholders and creditors. Its representation of Appellant is obviously inadequate. No provision was made in the Consent Decree for the preservation of, or a substitute for, the guaranty obligation. In the absence of an adequate remedy Appellant may be left with no alternative but to accept such substitute as Warner may voluntarily offer. It is equally manifest that Appellant will be bound by the Consent Judgment which compels the transfer of assets by, and dissolution of, Warner.

(b) *Appellant is so situated as to be adversely affected by the distribution or other disposition of property subject to the disposition of the Court.*

By the Consent Decree the District Court has directed the disposition of all of the assets of Warner by approving and requiring the carrying out of the plan of reorganization therein provided for. The result is as effectively to impair or destroy Appellant's property rights in the guaranty contract as if the decree had in terms dealt with the contract.

(c) *The Consent Decree deprives Appellant of property without due process of law.*

The destruction of Appellant's guaranty by the Consent Decree has been effected without notice to Appellant and without affording it an opportunity to be heard.

In *California Co-Op. Canneries v. U.S.*, 299 Fed. 908 (C.A.D.C. 1924), in ruling that a motion to intervene in a

Federal antitrust case had been improperly denied, Associate Justice Rutledge said:

"* * * When an equity court, in the exercise of its jurisdiction, makes a decree which, in determining the rights of the parties, enjoins one of them from carrying out a lawful contract with persons not parties to the suit, and gives effect to a cancellation clause of such contract, it is the duty of the court, if it retains jurisdiction of the case, as in this instance, to permit the intervention of the contracting party, who is not a party to the original suit, and who is detrimentally affected by the decree, and to give him an opportunity to be heard.

"As we have observed, without intervention appellant would be left remediless. Valuable contract rights have been stricken down, without notice to appellant or an opportunity to be heard. It is a fundamental principle of our jurisprudence that, before private rights may be affected by judicial decree, the party in interest must have due notice and an opportunity to be heard. Upon the strict observance of this principle rests the security of the citizen in the enjoyment of life, liberty, and property; otherwise, these rights could be divested without due process of law." (p. 914).

This case was reversed by the Supreme Court (279 U.S. 553 (1929)) but solely because the District Court of Appeals was without jurisdiction since the Supreme Court had exclusive jurisdiction by direct appeal from the District Court. The opinion of Associate Justice Rutledge is nonetheless cogent as indicating the substantial nature of the question involved in this case.

Appellant's motion was timely. The Warner guaranty was not impaired or destroyed by the previous decrees in this cause made on December 31, 1946 and February 8, 1950. Its impairment and destruction were effected by the Consent Judgment. Appellant's motion to intervene was

brought on for hearing before the signing of the Consent Judgment by an order to show cause issued by the District Court on an affidavit with pleading in intervention attached. The claim of Appellant was fully set forth therein and intervention was prayed in order that Appellant might assert the claim set forth in the intervention pleading. The prayer of said pleading was in substance that the District Court in the Consent Judgment or by separate order provide for the preservation of the guaranty obligations of Warner or provide an equivalent substitute therefor, including an assumption thereof by the two new corporations.

The District Court is charged with the duty of conserving the property interests of innocent third parties in connection with formulation of its decree in the antitrust action. *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911); *United States v. Union Pacific Railroad Co.*, 226 U.S. 470, 477 (1913).

In the *American Tobacco Co.* case the Supreme Court stated that dissolution decrees entered under the Sherman Act should have a proper regard for the vast interests of private property which may have become vested in persons who had no part in the Sherman Act Violations. Again in the *Union Pacific Railroad Co.* case the Supreme Court stated that in so far as was consistent with the main purpose of effecting the end of unlawful combinations, an equity court dealing with such combinations "shall conserve the property interests involved". (226 U.S. at p. 477).

Appellant does not challenge the Consent Decree except in so far as it affects Appellant's property and rights without making any provision for their conservation or for a substitute for the Warner guaranty.

Appellant contends that it is entitled to an equivalent substitute and that it is entitled as of right to have the District Court, which by its judgment destroyed the guaranty,

judicially ascertain such substitute equivalent for the guaranty.

That contention is supported by the decision of the Supreme Court in *Continental Insurance Company v. United States, Reading Company, et al.*, 259 U. S. 156 (1922). In that action brought under the Sherman Antitrust Act and the Commodities Clause of the Interstate Commerce Act, it was found necessary in a plan of reorganization under a decree requiring separation of coal properties from railroad properties, to disturb a general mortgage covering both properties. Although the mortgage was condemned by the Supreme Court (Mr. Chief Justice Taft writing for the Court) as "the indispensable instrument of the unlawful conspiracy to restrain commerce" (259 U.S. at p. 172), that Court nevertheless held that a judicially ascertained equivalent substitute should be provided for the general mortgage. In so ruling it quoted as expressing the views of the Supreme Court the following from an unreported opinion of the Court of Appeals of the Sixth Circuit in a phase of a similar case (*U.S. v. Lake Shore & M. S. Ry. Co.*, 203 Fed. 295):

"One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the Anti-Trust Law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent. Otherwise the mortgage will stand as the ready means of restoring—or at least tending to restore—these conditions which

the court is endeavoring to destroy. It may well be true that a railroad and a coal company under common ownership and management are worth more as security under a mortgage than when independent, and that their effective separation does impair the mortgage security, but this can not make the law helpless.' " (259 U.S., at pp. 172-173).

In the *Continental Company* case the District Court was directed by decree to modify the liability of the Reading Company and the Coal Company on the mortgage bonds in proportion to the values of their respective properties covered by the mortgage and to include, among other things, specific provisions for foreclosure of the separate liens on default.

The principle applies *a fortiori* to the guaranty of Warner which is a valid, subsisting and enforceable contract wholly unrelated to any violation of the antitrust laws or to any charge of illegality made by the Government in this cause.

List of Exhibits

Annexed hereto are copies of the following:

- (1) Copy of the decree of the District Court dated February 8, 1950, marked Exhibit 1; (2) copy of the Consent Judgment, dated January 4, 1951, marked Exhibit 2; (3) copy of the order dated February 26, 1951, denying Appellant's motion to intervene, marked Exhibit 3; and (4) copy of Appellant's motion papers (including Order to Show Cause, Affidavit and Pleading in Intervention), marked Exhibit 4.

Conclusion

The appeal petitioned for is within the exclusive jurisdiction of the Supreme Court. All jurisdictional requirements have been met. The appeal presents substantial questions meriting a review by the Supreme Court.

Respectfully submitted,

(s) **BERTRAM F. SHIPMAN, of
Mudge, Stern, Williams & Tucker
40 Wall Street
New York, N. Y.
Attorneys for Appellant**

Date: March 2, 1951.

EXHIBIT 1

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*
against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION (Formerly Known as Vitagraph, Inc.), WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U. FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION, *Defendants.*

FINAL DECREE

The plaintiff, having filed its petition herein on July 29, 1938, and its amended and supplemental complaint on November 14, 1940; the defendants having filed their answers to such complaint, denying the substantive allegations thereof; the court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 11, 1947; the plaintiff and the defendants having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this case to this court for further proceedings in conformity with its opinion dated May 3, 1948; this court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this court; a consent decree having been entered on November 8, 1948, against the defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Radio Corporation, RKO Mid-

west Corporation, and Keith-Albee-Orpheum Corporation; orders having been entered on stipulation against the Fox, Loew, and Warner defendants respectively, and Loew having further stipulated in the record, with respect to certain theatre interests held jointly with others; and a consent judgment having been entered on March 3, 1949 against defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation; and an order having been entered on April 21, 1949, severing and terminating, as of March 3, 1949, this action as against defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation; and an order having been entered on January 18, 1950 severing and terminating as of November 8, 1948 the action as against defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation;

Now, having considered the proposals of the parties, having duly received additional evidence and heard further arguments after entry of the consent decree against the RKO defendants, and having rendered its opinion on July 25, 1949, and having filed its findings of fact and conclusions of law in accordance with said opinion.

It is hereby ordered, adjudged, and decreed that the decree heretofore entered by this court on December 31, 1946 is hereby amended to read as follows:

I

1. The findings of fact and conclusions of law heretofore made are superseded by the findings and conclusions now entered in support of this decree.

2. The complaint is dismissed as to all claims made against the defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II

Each of the defendant distributors, Loews, Incorporated; Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.), Twentieth Century-Fox Film Corporation, and the suc-

sors of each of them (including but not limited to companies resulting from divorce), and any and all individuals who act in behalf of any thereof with respect to the matters enjoined and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.
2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.
3. From granting any clearance between theatres not in substantial competition.
4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.
5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant or with theatres in new circuits which may be formed as a result of divorce. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.
6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agree-

ment with a circuit of theatres in which the licensee fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

III

Each of the defendant exhibitors, Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century Fox Film Corporation; and National Theatres Corporation; and the successors of each of them (including but not limited to companies resulting from divorce), and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined and restrained:

1. From performing or enforcing agreements, if any, referred to in Paragraphs 5 and 6 of the foregoing Section II hereof to which it may be a party.

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors

normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share in the profits.

5. From continuing to own or acquiring any beneficial interests in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant, or with any company resulting from divorcements provided for in decrees entered in this cause.

6. From acquiring a beneficial interest in any additional theatre unless the acquiring company shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures, provided, however, that the acquisition of a theatre as a replacement for a theatre, held or acquired in conformity with this decree, which may be lost through physical destruction, conversion to non-theatrical purposes, disposition (other than the disposition of a theatre in compliance with this decree) or expiration or cancellation of the lease under which such theatre is held, shall not be deemed to be the acquisition of an additional theatre.

7. From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV

1. Within six months from the entry of this decree each of the major defendants named in Sections II and III of this decree shall submit a plan for the ultimate separation of its distribution and production business from its exhibi-

tion business. Upon the filing of such a plan, the Government shall have three months within which to file objections thereto and propose amended or alternative plans for accomplishing the same result. Such further proceedings with respect to such plans as the court may then order shall then be had. Such plans shall, in any event, provide for the completion of such separation within three years from the date of the entry of this decree.

2. Within one year from the entry of this decree the Government and each of the defendant exhibitors named in Section III of this decree shall submit respectively such plans for divestiture of theatre interests, other than those heretofore ordered to be divested, which they believe to be adequate to satisfy the requirements of the Supreme Court decision herein with respect to such divestiture. Upon the filing of such a plan the Government and the affected defendant shall have six months within which to file objections thereto and propose amended or alternative plans for accomplishing the same result. Such further proceedings with respect to such plans may then be had as the court may then order.

3. No defendant distributor named in Section II of this decree, and no distributor company resulting from the divorceement ordered herein, shall engage in the exhibition business; and no defendant exhibitor named in Section III of this decree, and no exhibitor company resulting from the divorceement ordered herein, shall engage in the exhibition business, except that permission to a distributor company resulting from divorceement to engage in the exhibition business or to an exhibitor company resulting from divorceement to engage in the distribution business may be granted by the court upon notice to the United States and upon a showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures.

4. No exhibitor company resulting from the divorceement ordered herein shall acquire directly or indirectly any interest in any theatre divested by any other defendant pursuant to any plan ordered under Paragraph 2 of Section IV hereof or pursuant to Paragraph C 1 of Section III of the

Consent Judgment as to the Paramount defendants entered
March 3, 1949.

V

Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries.

VI

The defendant distributors named in Section II of this decree and any others who are willing to file with the American Arbitration Association their consent to abide by the rules of arbitration and to perform the awards of arbitrators, are hereby authorized to set up an arbitration system with an accompanying Appeal Board which will become effective as soon as it may be organized, upon terms to be settled by the court upon notice to the parties to this action.

VII

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except in so far as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable.

VIII

1. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on notice to any defendant bound by this decree, reason-

able as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (a), be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present. For the purpose of securing compliance with this decree any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this decree as from time to time may be necessary for the purpose of enforcement of this decree.

2. Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

IX

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree, and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Dated: February 8, 1950.

AUGUSTUS N. HAND,

United States Circuit Judge.

HENRY W. GODDARD,

United States District Judge.

ALFRED C. COXE,

United States District Judge.

**United States District Court,
SOUTHERN DISTRICT OF NEW YORK.**

Equity No. 87-273.

UNITED STATES OF AMERICA,

Plaintiff,

—against—

LOEW'S INCORPORATED, *et al.*,

Defendants.

**CONSENT JUDGMENT AS TO THE WARNER
DEFENDANTS.**

The Warner defendants having consented to the entry of this judgment without admission by them in respect to any issues or matters in this cause open on remand, and the Court having considered the matter,

NOW, THEREFORE, UPON CONSENT OF THE PARTIES HERETO WITH RESPECT TO THE ISSUES AS TO WHICH ACTION WAS SUSPENDED OR RESERVED BY THE COURT, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I.

This judgment is rendered and entered in lieu of and in substitution for the decrees of this Court dated December 31, 1946, as amended, and February 8, 1950. This judgment shall be of no further force and effect and this cause shall be restored to the docket without prejudice to

either party if the proposed reorganization of the Warner defendants shall not have been approved by the stockholders of Warner Bros. Pictures, Inc. within ninety (90) days from the entry of this judgment. Upon such approval by the stockholders this cause shall be severed and terminated against the Warner defendants as of the date of this judgment.

II.

The Complaint is dismissed as to all claims made against the Warner defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

III.

The defendant Warner Bros. Pictures Distributing Corporation; its subsidiaries in which it has more than a fifty per cent interest, its successors, its officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.
2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.
3. From granting any clearance between theatres not

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof.
5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant* or with theatres in new circuits which may be formed as a result of divorcement, provided for in judgments entered in this cause. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.
6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres usually comprising a circuit.

* As used in this judgment, the term "defendant" or "defendants" means the defendants, or any of them, in Eq. Cause No. 87-273.

7. From performing or entering into any license, in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty percent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing any feature for exhibition upon any run, in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

IV.

The defendants Warner Bros. Pictures Inc. and Warner Bros. Circuit Management Corporation, their theatre subsidiaries in which they have more than a fifty per cent interest, their successors, their officers, agents, servants and employees are each hereby enjoined:

1. From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing Section III hereof to which it may be a party.
2. From making pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From acquiring any beneficial interest in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant, or with any company which may be formed as a result of divorce and provided for in judgments entered in this cause.

6. From acquiring a beneficial interest in any theatre provided that:

(a) Until the divorce and divestiture* provisions of this judgment have been carried out, beneficial interests in theatres may be acquired

(i) As a substantially equivalent replacement for and in the immediate neighborhood of wholly owned theatres** held or acquired in conformity with this judgment which may be lost through physical destruction or conversion to non-theatrical purposes;

* Divestiture under the terms of this paragraph 6 shall be deemed to mean the disposition of Warner's interest in the theatres referred to in paragraph 1 of Section V other than theatres which Warner or its exhibitor successor may in the future be required to dispose of thereunder (as distinguished from those presently required to be disposed of) and the theatres referred to in paragraph 3 of Section V.

** As used in this judgment the word "theatre" means "motion picture theatre in the United States" and the phrase "wholly owned theatre" means a theatre in which Warner or its exhibitor successor, or Warner or its exhibitor successor together with persons who are solely investors, own a beneficial interest of 95% or more in the lease or fee thereof.

(ii) In renewing leases covering any wholly owned theatre held or acquired in conformity with this judgment or in acquiring an additional interest in any such theatre under lease;

(iii) As a substantially equivalent replacement for any wholly owned theatre held or acquired in conformity with this judgment which has been lost through inability to obtain a renewal of the lease thereof upon reasonable terms, if Warner or its exhibitor successor shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition.

(b) After the divorcement and divestiture provisions of this judgment have been carried out, Warner's exhibitor successor may acquire a beneficial interest in any theatre only in the situations covered by paragraphs (i) and (ii) of the preceding subsection (a) unless Warner's exhibitor successor shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition will not unduly restrain competition.

7. From operating, booking or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

8. From making any agreement which restricts the right of any other exhibitor to acquire a motion picture theatre.

9. From acquiring in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres.

V.

1. Warner or its successor shall dispose of all its interest in the following theatres in the following towns:

ANSONIA, CONN.

One theatre; purchaser to have choice of theatres if Ansonia is designated as herein provided.¹

APPLETON, WIS.

One theatre if by the end of one year from the date of this judgment an independent² theatre is not regularly playing first run, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing first run.³ If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

BRISTOL, CONN.

One theatre.

¹ Within four months after the entry of this judgment, Warner shall designate two cities from among Ansonia, Conn., Gettysburg, Pa., Pleasantville, New Jersey, and Sidney, Ohio, in which the purchaser is to have his choice of theatre. No offer for the smaller theatre in each of such two cities shall be accepted until thirty days have elapsed after the properties have been offered for sale. The larger theatre in each of such two cities shall be sold if a reasonable offer therefor is made either during the thirty days or thereafter before the acceptance of a reasonable offer for the smaller theatre.

² As used herein, the term "independent" or "independently" refers to any theatre not affiliated with any of the defendants in Eq. Cause No. 87-273.

³ As used in this judgment "first run" means first run of the eight distributor defendants in Eq. Cause No. 87-273.

CHESTER, PA.	One theatre.
CLIFTON FORGE, VA.	One theatre.
CLINTON, MASS.	One theatre.
COSHOCTON, OHIO	One theatre, if at any time during a period of 3 years from the date of this judgment two Warner theatres play first run at a time when there is not more than one other theatre operating first run in Coshocton, except that there may be shown at the Pastime Theatre pictures for which a competitor who has had an opportunity to request licenses had not made an offer or had made an insubstantial offer, provided that upon the sole determination by the Attorney General or an Assistant Attorney General that a competing first run theatre will be adversely affected by the first run showing of such pictures at such theatre, Warner shall cease the showing of any pictures first run at such theatre within 30 days after receipt by Warner of the notice by the Attorney General of his determination.
DANBURY, CT, N.Y.	Empress or Palace, or Capitol. If Capitol is sold defendant or its successor must file with the Attorney General and the Court a statement of intention by the purchaser to operate said theatre on a first run basis.
DONORA, PA.	Harris or Princess.
DOVER, N. J.	One theatre.

ELMIRA, N. Y.

One theatre, if at any time during a period of 3 years from the date of this judgment three Warner theatres play feature films first run at a time when there is not more than one other theatre operating first run in Elmira.

FAIRMONT, W. VA.

One theatre if by the end of one year from the date of this judgment an independent theatre is not regularly playing first run, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

GETTYSBURG, PA.

One theatre; purchaser to have choice of theatres if Gettysburg is designated as provided in footnote 1.

GREENSBURG, PA.

One theatre.

HAGERSTOWN, MD.

One theatre.

HOBOKEN, N. J.

One theatre.

IRVINGTON, N. J.

One theatre.

LAWRENCE, MASS.

One theatre.

LEXINGTON, VA.

One theatre.

MANCHESTER, CONN.

One theatre.

MARTINSBURG, W. Va.	Apollo or Central and Strand or State.
MEDINA, N. Y.	One theatre.
MILLVILLE, N. J.	One theatre.
MILWAUKEE, Wis.	Warner or the Alhambra if by the end of one year from the date of this judgment an independent theatre is not regularly playing first run, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.
MONTCLAIR, N. J.	Claridge or Wellmont or Montelair.
NEWARK, N. J.	Stanley or Mayfair and Central or Tivoli or Savoy; the Ritz shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in the footnote hereto, ⁴ if during a

⁴ For a period of three years, defendant shall not license:

a. More than 60% of the feature films released by the major distributors for first neighborhood run exhibition in any fiscal year, except as to pictures for which competitors who have had an opportunity to request licenses have not made an offer or have made an insubstantial offer; and

period of three years from the date of this judgment an independent operator of a theatre in the Springfield Avenue zone, having a theatre suitable for first neighborhood run operation, is not afforded a reasonable opportunity to procure films for such theatre on a first neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's

[Footnote continued from preceding page.]

- b. More than 48 feature films from among the eighty pictures constituting the aggregate of the ten pictures released by each of the major distributors, respectively, for first neighborhood run exhibition in any fiscal year, which are allocated by the respective distributor to its highest selling bracket or brackets, except as to pictures for which competitors who have had an opportunity to request licenses have not made an offer or have made an insubstantial offer.

ruling; Capitol or Globe if by the end of one year from the date of this judgment an independent theatre is not regularly playing second run downtown Newark, or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre is not regularly playing second run downtown Newark. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

NEW BRITAIN, CONN.

Strand or Embassy or Capitol, but if Capitol is selected defendant shall divest one other theatre if by the end of a year from the disposition of the Capitol an independent theatre is not regularly playing first run or if thereafter (during a period of five years from the date of the disposition of the Capitol) for the greater part of any year an independent theatre is not regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

PASSAIC, N. J.

Montauk or Capitol or Central or Playhouse. If the Playhouse⁵ is disposed of in lieu of one of the other three theatres, then one of the other three theatres shall be disposed of if by the end of a year from the date of the disposition of the Playhouse no independent theatre is regularly playing on a first run basis or if thereafter (during five years from the date of the disposition of the Playhouse) for the greater part of any year there is not an independent theatre playing on a first run basis. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

PATERSON, N. J.

One theatre.

PHILADELPHIA, PA.

Midway or Allegheny; Colonial or Orpheum or Vernon; Rexy⁶ and Alhambra or Plaza or Broadway or Savoia, and one theatre shall be divested in addition to the two hereinabove required to be divested in this zone, which shall be the Broadway or the Savoia or another theatre

⁵ Warner or its exhibitor successor shall file with the Court and the Attorney General a statement of intention by the purchaser of the Playhouse to operate the Playhouse on a first run basis.

⁶ Warner or its exhibitor successor shall file with the Attorney General and the Court a statement of intention by the purchaser of the Rexy to operate the Rexy on a first neighborhood run basis.

operated on a first neighborhood run basis, if by the end of one year from the disposition of the Rexy an independent theatre is not regularly playing on a first neighborhood run, or if thereafter (during a period of five years from the date of disposition of the Rexy) for the greater part of any year an independent theatre is not regularly playing on a first neighborhood run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant. Colney or Fernrock⁷ and Diamond or Keystone,⁷ the Oxford or the Liberty shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4 (except substitute therein "second" for "first" neighborhood run), if during a period of three years from the date of this judgment an independent operator or operators of two theatres in the Frankford and Mayfair zones (formerly known as Frankford zone), having theatres suitable for second neighborhood run operation, is or are not afforded a reasonable opportunity to procure films for such theatres on

⁷ At the option of Warner, the Bromley may be chosen as one of the two theatres to be divested.

a second neighborhood run basis if he or they so desire. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator or operators of its election, which shall be made within 30^o days after the Court's ruling; the Forum shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4 (except substitute therein "Forum availability" for "first neighborhood run exhibition"), if during a period of three years from the date of this judgment an independent operator of a theatre in the Frankford zone, having a theatre suitable for playing on the same availability as the Forum, is not afforded a reasonable opportunity to procure films for such theatre on such availability if he

so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's ruling; Wishart or Richmond, if an independent theatre in the Kensington zone is not regularly playing third neighborhood run by the end of a year from the date of this judgment or if thereafter (during a period of five years from the date of this judgment) for the greater part of any year an independent theatre in the Kensington zone is not regularly playing third neighborhood run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

The Terminal if at any time for a period of 3 years after Warner begins operating the theatre pursuant to the provisions of paragraph 8 of this section V it is operated on a regular policy of exhibiting feature films earlier than seventeen to twenty-one days after first neighborhood run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination in which event the burden of proof shall be on the defendant.

The Wynne if at any time for a period of 3 years from the date of this judgment it is operated on a regular policy of exhibiting feature films earlier than third neighborhood run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination in which event the burden of proof shall be on the defendant.

PITTSBURGH, PA.: Strand or Center; Sheridan or Regent or Enright or Cameraphone. If Cameraphone is disposed of in lieu of one of the other three theatres, then one other of these three theatres shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4, if during a period of three years from the date of this judgment an

independent operator of a theatre in the East Liberty zone having a theatre suitable for first neighborhood run operation, is not afforded reasonable opportunity to procure feature films for such theatre on a first neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's ruling; and one other of these three theatres shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4 (except substitute therein "second" for "first" neighborhood run), if during a period of three years from the date of this judgment an independent operator of a theatre in the East

Liberty zone having a theatre suitable for second neighborhood run operation is not afforded a reasonable opportunity to procure feature films for such theatre on a second neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's ruling.

The Schenley shall at the option of the defendant or its successor be divested or be subjected to a product limitation as provided in footnote 4, if during a period of three years from the date of this judgment an independent operator of a theatre in the Oakland zone, having a theatre suitable for first neighborhood run operation, is not afforded a reasonable opportunity to procure

films for such theatre on a first neighborhood run basis if he so desires. If the parties disagree as to whether this condition has occurred, the matter may be presented to the Court for its determination. In that event, there shall be no burden of proof on either party, nor shall the defendant be excused from making this election because the condition may not exist at the time the matter is presented to or heard by the Court. In the event the condition is found to have occurred and the defendant chooses the product limitation, the three year period of such limitation shall run from the time the defendant or its successor shall have notified the Court, the Attorney General, and the independent operator of its election, which shall be made within 30 days after the Court's ruling.

PLEASANTVILLE, N. J.

One theatre; purchaser to have choice of theatres if Pleasantville is designated as provided in footnote 1.

PORPSMOUTH, OHIO

Columbia or LaRoy.

PUNXSUTAWNEY, PA.

One theatre.

RACINE, WIS.

One theatre.

SALEM, OREGON

Elsinore or Capitol if at any time during a period of 3 years from the date of this judgment two Warner theatres play first run at a time when there is not more than one other theatre operating first run

shown at the Capitol Theatre pictures for which a competitor who has had an opportunity to request licenses had not made an offer or had made an insubstantial offer, provided that upon the sole determination by the Attorney General or an Assistant Attorney General that a competing first run theatre will be adversely affected by the first run showing of such pictures at such theatre, Warner shall cease the showing of any pictures first run at such theatre within 30 days after receipt by Warner of the notice by the Attorney General of his determination.

SHARON, Pa.

One theatre.

SHEBOYGAN, Wis.

Two theatres.

SIDNEY, OHIO

One theatre, purchaser to have choice of theatre if Sidney is designated as provided in footnote 1.

SILVER SPRING, Md.

If at any time during a period of three years from the date of this judgment the Flower Theatre in Silver Spring is subordinated in playing position to the Silver Theatre while the latter is operated by Warner the question of divestiture of one theatre shall be reopened.

STATE COLLEGE, Pa.

Cathann or State.

STAUNTON, Va.

One theatre, if by end of a year there is not an independent theatre regularly playing first run or if thereafter (during a period of

years from the date of this judgment) during the greater part of any year there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

TARENTUM, PA.

One theatre, if by end of a year there is not an independent theatre regularly playing first run or if thereafter (during a period of 5 years from the date of this judgment) during the greater part of any year there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

TITUSVILLE, PA.

One theatre.

TORRINGTON, CONN.

Warner or Palace.

TYRONE, PA.

One theatre.

WARREN, PA.

One theatre.

WASHINGTON, D. C.

Tivoli or Sheridan.

WASHINGTON, PA.

One theatre if by end of a year there is not an independent theatre regularly playing first run or if thereafter (during a period of 5 years from the date of this judgment) during the greater part of

any year there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

WAYNESBORO, PA.

One theatre.

WELLSVILLE, N. Y.

One theatre.

WEST CHESTER, PA.

One theatre.

WILKINSBURG, PA.

Roland or State.

WILLIMANTIC, CONN.

One theatre.

WILMINGTON, DEL.

Warner or Queen or Arcadia or Grand.

YORK, PA.

One theatre, if by end of a year there is not an independent theatre regularly playing first run or if thereafter (during a period of 5 years from the date of this judgment) during the greater part of any year there is not an independent theatre regularly playing first run. If the parties disagree on the issue of whether or not this condition has occurred, such issue may be presented to the Court for its determination, in which event the burden of proof shall be on the defendant.

2. Warner or its successor shall within one year dispose of all of the interest of Warner in one half of the theatres presently required to be disposed of and within

two years of all of the theatres presently required to be disposed of, under paragraph 1 of this Section V. All theatres which may in the future be required to be disposed of under paragraph 1 of this Section V shall be disposed of within six months after the time they are required to be divested. All such dispositions shall be made to parties not defendants in Eq. Cause No. 87-273, or owned or controlled by or affiliated with defendants therein, or their successors.

3. As to not to exceed 12 of the theatres presently required to be disposed under paragraph 1 of this Section V, in the event that Warner or its exhibitor successor is unable to sell on reasonable terms its interest therein, Warner or its exhibitor successor upon application to the Court in any such case, and with the approval of the Court first obtained, may lease or sublease the same to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein; on condition, however, that no such lease or sublease shall contain any rental provisions based upon a share of the profits of the theatre covered by the lease or any other theatre; and further on condition that Warner or its exhibitor successor shall thereafter sell its interest in any such theatre so leased or subleased as soon thereafter as it can do so upon reasonable terms, and in any event prior to the expiration of such lease or sublease.

4. The Cadet, Elite and Poplar theatres in Philadelphia, Pa., shall be made available for a period of one year for sale or lease. Preference shall be given reasonable offers for motion picture theatre purposes, and until 30 days after making these properties so available for sale, no offer for non-motion picture purposes shall be accepted. After one year, these properties may be retained, sold or leased for any purpose; provided that if within a period of three years from the expiration of such year Warner desires to operate any of said theatres as

a motion picture theatre, Warner shall notify the Attorney General of its intention so to do, and if within 14 days thereafter the Attorney General notifies Warner that such operation will unduly restrain competition in the exhibition of featured motion pictures in the same competitive area as such theatre, Warner may present the matter to the Court for its determination.

5. If Warner or its exhibitor successor should at any time after the expiration of the present leases or the renewals thereof make the Playhouse premises in Ridgewood, N. J., available as a whole for sale or lease, preference shall be given to reasonable offers for motion picture theatre purposes, and until 30 days after making these premises so available, no offer for non-motion picture theatre purposes shall be accepted.

6. If the existing decree entered in the United States District Court for the Northern District of Illinois, Eastern Division, in the case of Florence B. Bigelow, et al., against RKO Radio Pictures Inc., et al., shall be modified or vacated, and if, after such modification or vacating, the competitive situation in outlying Chicago (outlying Chicago for the purposes hereof including the entire city of Chicago except the downtown portion of Chicago and also including Berwyn, Blue Island, Chicago Heights, Evanston, La Grange and Oak Park) shall be less favorable for the independent exhibitors in outlying Chicago (an independent exhibitor for the purposes hereof meaning an exhibitor who is not a defendant herein or owned or controlled by or affiliated with a defendant herein), and if such less favorable competitive situation shall be shown by the Attorney General to the satisfaction of the Court in which this consent judgment is entered, then such Court may order such relief against, or with respect to, the theatres of Warner or its exhibitor successor located in outlying Chicago as it may deem just or proper in order to create proper competitive conditions in outlying Chicago or in any particular section thereof.

7. This judgment shall not affect the rights and obligations of the parties under the consent orders entered in Eq. Cause No. 87-273 by stipulation between the plaintiff and the Warner defendants with respect to theatres held in conjunction with non-defendants.

8. Nothing in this judgment shall be construed to prohibit Warner until the divorceement required herein has been effectuated and thereafter its exhibitor successor from owning and operating one theatre in Bridgeport, Conn., and one theatre in Harrison, New Jersey, to be constructed in accordance with existing contractual commitments or amendments thereto, or to prohibit Warner from retaking and operating, in the future, the following theatres of Warner now under lease to others:

Aldine Theatre,	Wilmington, Del.
Ritz Theatre,	Reading, Pa.
Terminal Theatre,	Philadelphia, Pa.

VI.

A. The defendant, Warner Bros. Pictures, Inc., shall present to its stockholders not later than ninety (90) days after the entry of this judgment, a plan of reorganization to effect the divorceement of its theatre assets located in the United States from its production and distribution assets. Such plan shall provide that all of said theatre assets, together with other assets which are not production or distribution assets located in the United States, shall be transferred and assigned to one of the new companies, viz., the New Theatre Company, which shall succeed to and receive such assets, and all of said production and distribution assets, together with other assets which are not theatre assets located in the United States, shall be transferred and assigned to the other new company, viz., the New Picture Company, which shall succeed to and receive such assets, and the New Theatre Company shall distribute pro rata to the stockholders of Warner Bros.

Pictures; Inc., in exchange for the assets so received by it, its common capital stock, and the New Picture Company shall distribute pro rata to the stockholders of Warner Bros. Pictures, Inc., in exchange for the assets so received by it, its common capital stock, and thereupon Warner Bros. Pictures, Inc. shall be dissolved.

B. The New Picture Company shall not engage in the exhibition business, and the New Theatre Company shall not engage in the distribution business, except that permission to the New Picture Company to engage in the exhibition business or to the New Theatre Company to engage in the distribution business may be granted by the Court upon notice to the Attorney General and upon a showing that any such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures.

C. Upon the reorganization provided in this Section VI, Warner Bros. Pictures, Inc. shall cause the New Picture Company to file with the Court its consent to be bound by, and receive the benefits of, the terms of Sections III, VI, VII, VIII, X and XI of this judgment (with respect to Sections VII and VIII in so far as they are applicable to the New Picture Company), and thereafter the New Picture Company shall be in all respects bound by, and receive the benefits of, the terms of such Sections of this judgment.

D. Upon the reorganization provided in this Section VI, Warner Bros. Pictures, Inc. shall cause the New Theatre Company to file with the Court its consent to be bound by, and receive the benefits of, the terms of Sections IV, V, VI, VII, VIII, X and XI of this judgment (with respect to Sections VII and VIII in so far as they are applicable to the New Theatre Company), and thereafter the New Theatre Company shall be in all respects bound by, and receive the benefits of, the terms of such Sections of this judgment.

VII.

A. Within a period not to exceed twenty-seven months after the entry of this judgment the New Theatre Company and the New Picture Company shall be operated wholly independently of one another and shall have no common directors, officers, agents or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever. The foregoing provisions shall not be construed to prohibit the directors, officers, agents or employees of the Warner defendants, who become affiliated with either one of said new companies and who receive stock in such companies in exchange for stock presently held by them in Warner Bros. Pictures, Inc., from so acquiring stock in the company with which they do not become affiliated and holding such stock for a sufficient period of time to permit them to sell such stock to persons not affiliated with the seller's company without undue hardship to the seller, provided that in any event such sale shall be made within a period not to exceed one year from the effective date of the reorganization of Warner Bros. Pictures, Inc., and provided further that the provisions of this sentence as to the disposition of stock shall not apply to any agent or employee whose legal or beneficial interest in stock does not exceed one per cent (1%) of the total amount of stock outstanding in the company, and shall not apply to the persons who are subject to the provisions of Section VIII hereunder.

B. The by-laws of the New Theatre Company shall provide that a person affiliated with any other motion picture theatre circuit cannot be elected an officer or a director until he has been approved by the Attorney General and the Court; and that in no event can an officer or a director be affiliated with any motion picture theatre circuit (other than the Warner defendants) which has been

a defendant in an anti-trust suit brought by the Government, relating to the production, distribution or exhibition of motion pictures. The by-laws of the New Picture Company shall provide that a person who is a director, officer, agent, employee or substantial stockholder of another motion picture distribution company cannot be elected an officer or a director.

VIII.

Harry M., Albert and Jack L. Warner represent that they now own approximately 18% of the outstanding common stock (excluding treasury stock) of Warner Bros. Pictures, Inc. and that certain members of their families, including their wives, now own approximately 6% of such stock. Within twenty-seven months from the date hereof, the said Warners and their families shall either:

A. Dispose of said holdings of the stock of (1) the New Picture Company or (2) the New Theatre Company, as they may elect, to a purchaser who is not a stockholder in the other company, a defendant herein or in an anti-trust suit brought by the Government relating to the production, distribution, or exhibition of motion pictures against whom a judgment has been entered, or owned or controlled by or affiliated with such a defendant or a company resulting from divorcements provided for in judgments entered in Equity Cause No. 87-273, and the said Warners shall use their best efforts so to dispose of said stock; or

B. Deposit with a trustee designated by the Court said holdings of stock of the New Picture Company or the New Theatre Company, as they may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with

respect thereto. Such voting trust agreement shall thereafter remain in force until the said Harry M. Warner, Albert Warner, Jack L. Warner, and their families shall have sold said holdings of stock of the New Picture Company or the New Theatre Company to a purchaser or purchasers as provided in subdivision A above, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms and conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Harry M. Warner, Albert Warner, Jack L. Warner, and their families, shall be entitled to receive all dividends and other distributions made on account of the trustee shares, and proceeds from the sale thereof.

For the purpose of evidencing their consent to be bound by the terms of this Section VIII of this judgment, Harry M. Warner, Albert Warner and Jack L. Warner individually have consented to its entry. The obligations in this Section VIII with respect to the stock in the New Picture Company, or the stock in the New Theatre Company, as the case may be, shall be limited, so far as the families of the said Warners are concerned, to the stock received in exchange for approximately 6% of stock of Warner Bros. Pictures, Inc. mentioned in this Section VIII as owned by certain members of the said families.

The stock disposed of in one company as provided in subdivision A above may not be voted if the holder, otherwise entitled to vote the same, be a person with a legal or beneficial stock interest, or be a corporation with a stock interest directly or through subsidiaries or affiliates, in the other company.

IX.

A. Nothing contained in this judgment shall be construed to limit, in any way whatsoever, the right of the Warner defendants, during the period of 12 months from

the date hereof, or until the reorganization provided in Section VI hereof shall have been completed, whichever shall be earlier, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute; in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Warner Bros. Pictures Inc. has or may acquire a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

B. After 12 months from the date hereof, or until the reorganization provided in Section VI hereof shall have been completed, whichever shall be earlier, the provision of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or Warner Bros. Pictures Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this judgment.

X.

A. For the purpose of securing compliance with this judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this judgment, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be

present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present. For the purpose of securing compliance with this judgment any defendant upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this judgment as from time to time may be necessary for the purpose of enforcement of this judgment.

B. Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice; except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

XI.

A. For the purpose of any application under this judgment, the plaintiff and the Warner defendants, hereby waive the necessity of convening a court of three judges pursuant to the expediting certificate filed herein on June 13, 1945; and agree that any application may be determined by any judge sitting in the United States District Court for the Southern District of New York.

Any application by either party under this judgment shall be upon reasonable notice to the other.

B. Jurisdiction of this cause is retained for the purpose of enabling any of the parties and their successors to this consent judgment, and no others, to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction, modification or

carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Dated: January 4th, 1951.

AUGUSTUS N. HAND
United States Circuit Judge

HENRY W. GODDARD
United States District Judge

ALFRED C. COXE
United States District Judge

We hereby consent to the entry of the foregoing judgment.

For the Plaintiff

PEYTON FORD
Acting Attorney General

United States Attorney

WM. AMORY UNDERHILL
Acting Asst. Attorney General

PHILIP MARCUS
SIGMUND TIMBERG
Spec. Assts. to Atty. Gen.

MAURICE SILVERMAN
HAROLD LASER
Trial Attorneys

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For the Defendants

WARNER BROS. PICTURES INC.

WARNER BROS. PICTURES DISTRIBUTING CORPORATION

WARNER BROS. CIRCUIT MANAGEMENT CORPORATION

By

JOSEPH M. PROSKAUER

ROBERT W. PERKINS

Their Attorneys

We hereby consent to the entry of Section VIII of the above judgment.

HARRY M. WARNER

ALBERT WARNER

JACK L. WARNER

By

STANLEIGH P. FRIEDMAN

Their Attorney

EXHIBIT 3

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,
against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., ET AL.,
Defendants.

SUTPHEN ESTATES, INC., *Applicant for Intervention.*

ORDER DENYING MOTION FOR LEAVE TO INTERVENE

This cause having come on for hearing on the 4th day of January, 1951 on the order to show cause herein dated January 2, 1951 made on the application of Sutphen Estates, Inc., why said Sutphen Estates, Inc. should not be granted leave to intervene in this cause, and this Court having heard argument on said motion prior to the signing on said date of the judgment made herein on the consent thereto of the United States of America, Warner Bros. Pictures, Inc., Warner Bros. Distributing Corporation, Warner Bros. Circuit Management Corporation, and on the consent to Section VIII thereof by Harry M. Warner, Albert Warner and Jack L. Warner, and having announced at the conclusion of said argument its decision denying said motion, it is

Ordered, that the motion of Sutphen Estates, Inc. for leave to intervene in this cause is denied.

Dated: February 26, 1951.

(S.) AUGUSTUS N. HAND,
Circuit Judge.

(S.) HENRY W. GODDARD,
District Judge.

(S.) ALFRED C. COXE,
District Judge.

EXHIBIT 4

Appellant's papers on motion to intervene, including:

- (a) Order to Show Cause.
- (b) Affidavit.
- (c) Pleading in Intervention.

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*
against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., ET AL.,
Defendants.

SUTPHEN ESTATES, INC., *Applicant for Intervention.*

ORDER TO SHOW CAUSE ON MOTION TO INTERVENE

On the annexed affidavit of Bertram F. Shipman, sworn to the 2nd day of January, 1951; on the annexed Pleading in Intervention on behalf of Sutphen Estates, Inc.; and upon all of the pleadings and other papers filed and all of the proceedings heretofore had herein,

Let the parties affected by said pleading in intervention and their attorneys show cause at a term of this court to be held in Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 4th day of January, 1951, at 4 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein granting leave to said Sutphen Estates, Inc. to intervene in this action in order to assert the claim set forth in the annexed Pleading in Intervention; and

Good cause being shown and sufficient reason appearing therefor, it is

Ordered, that service of a copy of this order and of said Affidavit and of said Pleading in Intervention on the attorneys for plaintiff The United States of America, and on the attorneys for defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation on or before 12 o'clock noon of the 3rd day of January, 1951, shall be deemed good and sufficient service thereof.

Dated: New York, N. Y., January 2, 1951.

AUGUSTUS N. HAND,
U. S. C. J.
HENRY W. GODDARD,
U. S. D. J.
ALFRED C. COXE,
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, Plaintiff,
against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., ET AL.,
Defendants.

SUTPHEN ESTATES, INC., Applicant for Intervention:
AFFIDAVIT

Bertram F. Shipman, being duly sworn, deposes and says:

- I am a member of the firm of Mudge, Stern, Williams & Tucker, attorneys for Sutphen Estates, Inc., a New York corporation, the Intervener in the annexed Pleading in Intervention, and I am familiar with the matters relating

thereto and herein set forth. I make this affidavit in support of an application for an Order to Show Cause directed to the parties in this action affected thereby, namely, plaintiff The United States of America, and defendants Warner Bros. Pictures, Inc. (hereinafter referred to as Warner), Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, granting leave to said Intervener to intervene in this action in order to assert the claim set forth in said Pleading in Intervention.

2. Intervener is the landlord of the very valuable property on the northwest corner of Broadway and 47th Street in the City of New York, New York on which is located the Strand Theatre. Said property is under lease to Stanley Mark Strand Corporation (hereinafter referred to as Tenant) for a term of 98 years beginning January 1, 1929, the lease as amended providing, among other things, for an annual rental, currently at the rate of \$300,000 per annum in addition to taxes and other charges payable by Tenant, and including an obligation on the part of Tenant to alter and improve the buildings on the property, to secure which obligation Tenant is required to deposit with Intervener \$100,000 a year for 10 years beginning with December 15, 1948, a total of \$1,000,000, of which \$300,000 has been so deposited to date. All obligations of Tenant under the lease are unconditionally guaranteed by defendant Warner which owns approximately 99% of the stock of Stanley Company of America, which owns all of the stock of Tenant.

3. Upon information and belief, a judgment proposed to be consented to herein by plaintiff and Warner, among others, and proposed to be made and entered herein, provides for the transfer of all of the so-called exhibition assets of Warner to a new corporation in exchange for all of its capital stock, the transfer of all other assets of Warner to another new corporation in exchange for all of its capital stock, the distribution pro rata to stockholders of Warner of all of the shares of capital stock of said two new corporations and the dissolution of Warner; and directs that a plan of reorganization providing for such transfers, distribution and dissolution be submitted to stockholders of Warner for approval within 90 days from the date of said proposed con-

sent judgment. Upon information and belief, said proposed consent judgment contains no express provisions preserving or protecting the rights of Intervener with respect to said guaranty by Warner and may contain provisions which may or may be claimed to limit or restrict Warner in providing adequately for a substitute for its guaranty upon its dissolution.

4. Intervener's motion to intervene in this motion is made under Rule 24 of the Federal Rules of Civil Procedure as Amended, and is based upon the grounds that:

(a) Intervener is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of this court in connection with said consent judgment;

(b) representation of Intervener's interest by existing parties herein is or may be inadequate and Intervener is or may be bound by said consent judgment; and

(c) Intervener's claim and the main action herein insofar as said consent judgment is involved have questions of law and fact in common;

all as more fully appears from said Pleading in Intervention to which reference is hereby made.

5. I have discussed the claim set forth in said Pleading in Intervention with officers and other representatives of Intervener, and have considered said Lease and the agreements supplemental thereto, including the guaranty agreement of Warner and the agreements supplemental thereto, and on the basis of my investigation I believe and I have advised Intervener that the claim set forth in said Pleading in Intervention is a meritorious claim, and that Intervener should be permitted to intervene in this action in order to assert said claim; and in order that said consent judgment herein or other order made herein shall make adequate provision for the preservation or protection of the rights of Intervener with respect to the guaranty by Warner of the obligations set forth in said Lease as amended, and directing that an equivalent substitute be provided for said guaranty

in connection with the transfer of Warner's assets and its dissolution as contemplated in said consent judgment.

6. The reason that this application is made by Order to Show Cause rather than by Notice of Motion is that an Order to Show Cause is necessary in order to bring on the Motion to Intervene herein before this court on the 4th day of January, 1951, when said proposed consent judgment is to be presented to this court.

7. No previous or other application has been heretofore made for the relief sought herein.

Wherefore it is respectfully requested that an order be made and entered herein granting leave to Intervener to intervene in this action in order to assert the claim set forth in said Pleading in Intervention, and granting to Intervener such other, further and different relief as in the premises may be just, equitable and proper.

BERTRAM F. SHIPMAN.

Sworn to before me this 2nd day of January, 1951.

[Notarial Seal]

BERNARD A. GUNN,
Notary Public, State of New York

No. 03-1604800

Qualified in Bronx County
Certificates filed with Bronx & N. Y.
Co. Clk's. & Register's Offices
Term Expires March 30, 1951

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, Plaintiff,
against

LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., ET AL.,
Defendants,

SUTPHEN ESTATES, INC., *Intervener.*

PLEADING IN INTERVENTION

Sutphen Estates, Inc., the Intervener herein, for its Pleading in Intervention alleges as follows:

1. Sutphen Estates, Inc., the Intervener herein, is a corporation, duly organized and existing under the laws of the State of New York, having its principal office at No. 60 East 42nd Street, in the Borough of Manhattan, City, County and State of New York.

2. On or about December 31, 1928, a certain Lease bearing said date (hereinafter called the Lease) was duly made, executed and entered into by and between Intervener as landlord and Stanley Mark Strand Corporation, a New York corporation, as tenant (hereinafter called Tenant). Said lease covers the premises described therein on the northwest corner of Broadway and 47th Street in the City of New York, together with the buildings thereon which include the Strand Theatre. Said Lease is for a full term of approximately 98 years beginning at the date of said Lease and ending December 31, 2026. By the terms of the Lease the current rental thereunder and until the end of the year 1952, is at the rate of Three Hundred Thousand Dollars (\$300,000) per annum, payable in equal monthly installments in advance on the first day of each and every month. Thereafter and for successive periods of 21, 21, 21 and 11 years, respectively, the annual rental thereunder

is to be five per cent (5%) of the appraised value of the land, or the annual rental payable during the last year of the preceding period, whichever is greater, all as determined and as provided in the Lease. Tenant is obligated in addition to pay taxes, water rates, assessments, insurance premiums and other charges assumed by the Tenant and to be paid and discharged by the Tenant, all as in the Lease provided.

3. At all times herein referred to, Tenant has been and is a wholly owned subsidiary of Stanley Corporation of America, and said corporation has been and is a more than 90% owned subsidiary of Warner Bros. Pictures, Inc. (hereinafter called Warner).

4. Among the covenants to be performed by the Tenant under the Lease was a covenant set forth in Article Seventeenth of said Lease whereby Tenant agreed to demolish and remove the buildings upon the leased premises and to erect in place thereof a new Five Million Dollar (\$5,000,000) theatre and office building within six years from January 1, 1929, at a cost and in the manner in the Lease provided.

5. On or about January 5, 1931, said new theatre and office building not having been built or commenced, at the request of Tenant and by an agreement dated January 5, 1931 between Intervener and Tenant, the time for the erection and completion of such new building was extended to January 1, 1938, and simultaneously by an agreement dated June 5, 1931 between Intervener and Warner, said Warner, for valuable consideration and as an inducement to Intervener to grant such extension, guaranteed the prompt and faithful performance by Tenant of all the terms, covenants and conditions of the Lease as amended. Subsequently, at the requests of Tenant and by agreements between Intervener, Tenant and Warner dated April 4, 1934; April 1, 1937 and October 10, 1941, respectively, the Lease was further amended and supplemented and the time for the erection and completion of said new building was successively extended to January 1, 1953.

6. Subsequently, at the request of Tenant and Warner and by agreement between Intervener, Tenant and Warner

dated as of December 15, 1948, Article Seventeenth of the Lease was deleted and a new Article Seventeenth was substituted which among other things provides for the alteration and improvement of the present buildings on the leased premises to modern two story and basement store office and commercial buildings with foundations and construction sufficient to support an eight story fireproof building, at an estimated cost of \$1,000,000 all as elaborately provided in said agreement. Said agreement of December 15, 1948 provides that Tenant shall pay to Intervener on the 15th day of December, 1948, of the sum of One Hundred Thousand Dollars (\$100,000) and a like sum on the 15th day of December in each year thereafter, to and including the 15th day of December, 1957, or an aggregate of One Million Dollars (\$1,000,000) and that said amount shall be deposited by Intervener in a separate banking account captioned "Strand Theatre Building Trust Fund" and held by Intervener in trust as security against default of Tenant to alter and improve the buildings as provided in said agreement. In and by said agreement of December 15, 1948, Warner, as guarantor of the performance of the Lease by Tenant, approved and consented to said modification of the Lease, joined in the execution of said agreement of December 15, 1948, and agreed that Warner's said guaranty shall remain in full force and effect and shall include a guaranty of the performance by Tenant of all the obligations imposed upon and assumed by Tenant under the Lease as supplemented, amended and modified as above set forth, including all obligations imposed upon and assumed by Tenant by said agreement of December 15, 1948. Tenant has, to date, made three (3) annual payments into said Fund, totalling Three Hundred Thousand Dollars (\$300,000), the last payment of One Hundred Thousand Dollars (\$100,000) having been made on December 15, 1950.

7. Said Lease as so supplemented, amended and modified, and the guaranty by Warner of the obligations of Tenant thereunder, are and remain in full force and effect, and said guaranty by Warner constitutes a valid, effective and binding obligation of Warner to and for the benefit of Intervener.

8. Upon information and belief, in this action a judgment, proposed to be consented to by plaintiff and defendant Warner, among others, (hereinafter called Consent Judgment), is to be presented to this Court, whereby, among other things, this Court will decree that a plan of reorganization shall be presented to the stockholders of Warner providing in part that:

- (a) Two new corporations will be formed;
- (b) To one of such new corporations there will be transferred all of the so-called exhibition assets of Warner, which will include all of the shares of capital stock of Tenant, in exchange for all of the shares of capital stock of said new corporations;
- (c) To the other of such new corporations there will be transferred all other assets of Warner in exchange for all of the shares of capital stock of said new corporation;
- (d) All of the shares of capital stock of said two new corporations will be distributed pro rata to the stockholders of Warner; and
- (e) Warner will thereafter be dissolved.

Upon information and belief, the Consent Judgment will further provide that prior to or at an early date after the transfer of the exhibition assets of Warner to said new corporation a substantial number of theatre properties included among said exhibition assets shall be disposed of.

9. Said proposed plan of reorganization, if adopted and carried out as provided by the Consent Judgment, will destroy, and deprive Intervener of its valuable rights in, to and under said guaranty of Warner, which is a valid, subsisting obligation, unrelated to any anti-trust violations by Warner or by any other defendant herein, and the destruction of which is unnecessary to full compliance by Warner and the other Warner defendants with the Final Decree of this Court made herein dated February 6, 1950.

10. Upon information and belief, said proposed plan of reorganization as provided in the Consent Judgment is not required by said Final Decree; that said Final Decree, although providing for a divorcement of the exhibition busi-

ness of Warner from its production and distribution business, afforded to Warner wide latitude in the formulation of a plan to comply with such divorcement provisions; and that the plan as provided in the Consent Judgment was selected by Warner in preference to numerous other alternatives as most advantageous economically or otherwise to the stockholders of Warner.

11. Upon information and belief the Consent Judgment although providing for the transfer by Warner of all of its assets and its dissolution, as aforesaid, contains no express provision for the preservation or protection of Intervener's rights in respect of said guaranty obligations of Warner nor for an equivalent substitute for said guaranty obligations, and no provision for such preservation or protection or for such an equivalent substitute is or will be made in or in connection with said plan of reorganization or the transfer of the assets of Warner or its dissolution.

12. Upon information and belief, unless the Consent Judgment or other order or judgment made in this action and/or said plan of reorganization provides for such preservation or protection or for an equivalent substitute for said guaranty obligations of Warner, which should include in any event the joint and several assumption of said guaranty obligations by said two new corporations, said transfer of the assets of Warner and its dissolution after the contemplated distribution to its stockholders, will destroy the valuable rights of Intervener in said guaranty obligations, to the immediate great and irreparable damage of Intervener, and Intervener will be deprived of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States of America.

13. Upon information and belief, Intervener is entitled to intervene as of right in this action under Rule 24 of the Federal Rules of Civil Procedure as Amended upon the ground that under the circumstances herein set forth Intervener is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of this

court by virtue of the Consent Judgment, and upon the further ground that representation of Intervener's interest by existing parties in this action is or may be inadequate and that Intervener is or may be bound by the Consent Judgment.

14. Upon information and belief Intervener is entitled to be permitted to intervene in this action under Rule 24 of the Federal Rules of Civil Procedure as Amended upon the ground that Intervener's claim and the main action herein insofar as the Consent Judgment is involved have questions of law and fact in common.

15. Intervener has no adequate remedy save by intervention in this action, to avoid the immediate, great and irreparable damage to it which would result from the making and entry herein of the Consent Judgment without adequate provision being made in the Consent Judgment or other order of this Court in this action for the preservation or protection of Intervener's valuable rights as hereinabove set forth.

Wherefore, Intervener respectfully prays:

(a) That Intervener be permitted to intervene in this action for the purpose of asserting the claim herein set forth;

(b) That this Court refrain from signing the Consent Judgment unless and until the Consent Judgment and the plan of reorganization of Warner provided for therein are amended to assure preservation of said guaranty obligations of Warner or to provide a fully equivalent substitute for such guaranty obligations which shall include an assumption of said guaranty obligations jointly and severally by the two new transferee corporations proposed to be formed;

(c) In the alternative, that this Court by separate order made herein direct that said guaranty obligations be preserved, or that a fully equivalent substitute therefor be provided which shall include an assumption of said guaranty obligations jointly and severally by the two new transferee corporations proposed to be formed; and

(d) That Intervener have such other, further and different relief as in the premises may be just, equitable and proper.

Dated: New York, N. Y., January 2, 1951.

BERTRAM F. SHIPMAN OF
Mudge, Stern, Williams & Tucker,
Attorneys for Intervener,
Office and P. O. Address,
40 Wall Street,
New York 5, N. Y.

(4220)

APR 24 1961

Supreme Court of the United States

OCTOBER TERM, 1950.

No. [REDACTED]

25

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *et al.*

Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS AND MOTION TO AFFIRM,

BERTRAM F. SHIPMAN,
Counsel for Appellant.

MUDGE, STERN, WILLIAMS & TUCKER,
H. G. PICKERING,
MILTON BLACK,
LEONARD GARMENT,

Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 668.

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED,
WARNER BROS. PICTURES, INC., *et al.*,

Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS AND MOTION TO AFFIRM.

This brief is submitted pursuant to paragraphs 3 and 4 of Rule 7 of this Court in opposition to (a) the Warner Defendants' statement in opposition to jurisdiction, which includes a prayer to dismiss, and (b) the motion of the United States to affirm.

Preliminary Statement.

This is a direct appeal from an order of the United States District Court, Southern District of New York, denying Appellant's motion to intervene in an action brought by the United States to enjoin violations of Sections 1 and

2 of the Sherman Antitrust Act by certain motion picture producers, exhibitors and distributors and from a Consent Judgment entered therein against Warner Bros. Pictures, Inc. (hereinafter referred to as Warner), Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation (said three defendants being hereinafter referred to as the Warner Defendants). The cause was tried by a three-judge court. Appellant's motion and the proposed Consent Decree were presented to said court on the same day (January 4, 1951) and after a hearing the court denied said motion and signed the Consent Judgment; which was entered the following day (January 5, 1951). A formal order denying Appellant's motion was made and entered February 20, 1951.

Appellant's appeal was allowed March 2, 1951 and appeal papers were served upon the United States and all defendants on March 6, 1951.

No opinion was delivered by the District Court on the denial of Appellant's motion or on the signing of the Consent Decree.

Jurisdiction.

The jurisdiction of this Court to review said Consent Judgment and said order is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C., Sec. 29), and Title 28 U. S. C., Sec. 2101.

Appellant's intervention was claimed as of right under Rule 24(a), and as matter of discretion under Rule 24(b), of the Federal Rules of Civil Procedure and also under the due process clause of the Fifth Amendment to the Constitution of the United States.

The pertinent provisions of the statutes and rules are quoted in Appellant's Statement of Jurisdiction, pp. 3-5.

ARGUMENT.

A.

This Court clearly has jurisdiction of this appeal.

That this Court has jurisdiction is clear from Appellant's discussion of that subject in its Statement of Jurisdiction and from the statutes and authorities there referred to (pp. 3, 4).

The appeal is from the final Warner Consent Judgment and from the order denying Appellant's intervention which was claimed as of right under Rule 24(a) of the Federal Rules of Civil Procedure.

The subject of appealability of orders denying applications for intervention under Rule 24(a) of the Federal Rules of Civil Procedure which provides for intervention as of right and under Rule 24(b) which relates to permissive intervention was considered by this Court in *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., et al.*, 331 U. S. 519 (1947). This Court said:

"Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it" (pp. 524-525).

The Warner Statement relies upon *St. Louis Amusement Co. v. United States*, 326 U. S. 680 (1945), as requiring a dismissal of this appeal. It is clear from the statement of jurisdiction and opposing papers filed on that appeal and from the cases cited in the *per curiam* decision

of this Court that the petitioner sought intervention "for the purpose of impeaching a decree already made" (*U. S. v. California Canneries*, 279 U. S. 553, 556 (1929)), and that the judgment complained of (the interim consent judgment in this cause providing for a system of arbitration) was not a final judgment (*Allen Co. v. Cash Register Co.*, 322 U. S. 137, 142 (1944)).

In the *Cash Register Co.* case the appeal to this Court from an order denying intervention in an antitrust action brought by the United States was dismissed on the ground that it was but an order in the cause and not the final judgment. Noting, however, that a final decree had been entered prior to the allowing of the appeal, this Court said:

" * * * if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment * * *." (322 U. S., at p. 142)

The Warner Consent Judgment appealed from is the "final decree" in this cause and is attacked because Appellant has been wrongfully denied intervention.

This Court's affirmation of orders denying intervention in relation to the Final Decree as to all defendants in this cause (*U. S. v. Paramount Pictures, Inc., et al.*, 334 U. S. 131, 178 (1948)) and in relation to the final Consent Judgment as to the Paramount defendants (*Ball, Trustee v. U. S.*, 338 U. S. 802 (1949), and *Partmar Corporation v. U. S.*, 338 U. S. 804 (1949)) establishes that this Court has jurisdiction of Appellant's appeal. This is tacitly conceded by the Government, which has not moved to dismiss but to affirm.

B.

Appellant was entitled as of right to intervene and the denial of such right was error.

Before answering the contentions of Appellees it will be helpful briefly to summarize Appellant's position.

The Warner Consent Judgment requires a distribution of all of the property of Warner. The court below exercised jurisdiction with respect to the property, assumed control over it and decreed its disposition. The distribution or disposition of all of the property of Warner so decreed adversely affects Appellant with respect to Warner's guaranty of the obligations of its subsidiary under a theatre lease (not disturbed by the Consent Judgment) with Appellant which has more than 75 years to run, with a cash liability of more than \$23,000,000. The Warner guaranty of the lessee's obligations under the lease is a valid subsisting obligation unrelated to any antitrust violations by Warner or any other defendant in this cause.

This would seem to be a situation squarely within clause 2, Rule 24(a) of the Federal Rules of Civil Procedure, which requires the allowance of intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." Appellant based its right to intervene also upon the ground that representation of its interest by existing parties was inadequate and Appellant was or might be bound by the Consent Judgment (clause 2 of Rule 24(a)), and upon the due process clause of the Fifth Amendment to the Constitution of the United States.

The judgment effects the destruction of the Warner guaranty. The judgment in substance requires Warner to transfer all its theatre assets to a new Theatre Company and all its other assets to a new Picture Company in exchange for all of the stock of the two new companies, which is to be issued directly pro rata to the Warner stockholders. Warner, thus rendered insolvent, is then required to be dissolved.

The Final Decree of February 8, 1950 of the District Court in this cause, affirmed by this Court (*Loew's Incorporated, et al. v. United States*, 339 U. S. 974 (1950)) did not require the reorganization and dissolution of Warner as provided for in the Consent Judgment. What was required by that decree was "the ultimate separation of its distribution and production business from its exhibition business". (Exhibit 1 to Appellant's Statement of Jurisdiction, Section IV, pp. 19-20). The particular plan selected from among many which might have been chosen was presumably considered most advantageous to the stockholders of Warner as a tax-free reorganization but it directly, seriously and unnecessarily affects the rights of Appellant under the Warner guaranty.

The remedy sought by Appellant was simply that the court ascertain what should be substituted for the guaranty whose destruction it was bringing about. Appellant prayed that this be done either by a provision in the Consent Judgment or by a separate order in the cause. (Appellant's Statement of Jurisdiction, Pleading in Intervention, Exhibit 4 (c), p. 68). At the hearing below it was made clear that Appellant was not seeking to disturb or delay the making of the Consent Judgment. Appellant offered to postpone the intervention hearing three or four weeks to see if a satisfactory solution could be worked out with Warner. (See p. 10, *infra*.)

Appellant did not and does not challenge the Consent Judgment or any of its provisions in any respect. It did not and does not seek in any manner to interfere with or obstruct the distribution of the property of Warner or its dissolution as required by the Consent Judgment. It had and has no desire or intention to interject itself in the litigation between the United States and Warner in respect of the enforcement of the antitrust laws and the formulation of remedies for their violation. It did not and does not question the propriety of, or seek in any manner to have modified, the remedies imposed by the Consent Judgment.

Appellant's contention was and is that it is entitled to have the court below in this cause ascertain and order an equivalent substitute for the guaranty of Warner. The substitute prayed for in Appellant's Pleading in Intervention is the guaranty of both new companies to which the Consent Judgment requires all of the property of Warner to be transferred. (Exhibit 4(c) to Appellant's Statement of Jurisdiction, paragraphs (b) and (c), p. 68).

The following considerations plainly entitle Appellant to such relief:

1. Upon a voluntary corporate reorganization where a new company is organized and receives all the assets and continues the business of the old corporation and all of the stock of the new company is distributed pro rata to the stockholders of the old company which is then dissolved, the new company is deemed to have assumed all the obligations of the old corporation. This is but an application of the corporate trust fund doctrine which safeguards those who deal with corporations against distribution of corporate assets to stockholders in priority over corporate creditors. In such case not only can the corporate assets

be followed; but, there being identity of stockholders in the transferee and transferor corporations, the transferee corporation becomes personally liable. *Calvin v. Washington Properties*, 121 F. (2d) 19, 25 (C. A. D. C., 1941); *Pearce v. Schneider*, 242 Mich. 28, 217 N.W. 761 (1928); *Bankers Trust Co. v. Hale & Kilburn Corporation*, 84 F. (2d) 401 (C. A. 2nd, 1936); *Northern Pacific Ry. v. Boyd*, 228 U. S. 482, 502-503 (1913); *Male v. Atchison, Topeka & Santa Fe Ry. Co.*, 230 N. Y. 158, 165 (1920).

2. The same rule applies where there are two transferee corporations whose stockholders and those of the transferor corporation are identical. *Bankers Trust Co. v. Hale & Kilburn Corp.*, 84 F. (2d) 401 (C. A. 2nd, 1936). Accordingly both transferee corporations would be personally liable for all obligations of the transferor corporation.

3. Appellant therefore sought to have the court adjudicate only the obligation which under established principles of equity would be imposed upon the new Picture Company and the new Theatre Company as matter of law if the Warner reorganization were free of the compulsion of a Consent Judgment in an antitrust action.

4. The fact that the distribution of Warner's property and its dissolution are required by the Consent Judgment and may be held not to be voluntary¹ casts doubt as to the applicability of these settled equity principles. Moreover, the categorical statement of the United States on the hearing below (as quoted in Warner's Statement filed herein) that it would be unalterably opposed to a guaranty by the

¹ In *Kokel v. Paramount Pictures, Inc.*, 300 N. Y. 685 (1950), it was held that the dissolution of Paramount pursuant to the plan of reorganization under the Paramount Consent Decree in this cause was not voluntary.

new Picture Company is advance notice of its opposition to any attempt hereafter to impose such guaranty obligation on the two new companies under the settled equity doctrine.

5. Appellant has no adequate remedy except by intervention in this action. Since Warner's guaranty is a contingent obligation, Appellant's right to enforce the liability against property in the hands of the transferee corporations or against the shares of stock of those corporations in the hands of Warner's 27,000² stockholders will not arise until there is a default under the lease and judgment is obtained against Warner. As the lease has more than 75 years to run (and defaults might not occur for 10, 20 or 50 years or more) such right will prove to be illusory and unenforceable for all practical purposes because of changes which will inevitably occur in the assets themselves, in their ownership and in the ownership of shares of stock of the two new companies. Any remedy available to Appellant on the dissolution of Warner is highly conjectural. At the time of its dissolution Warner will have transferred all its property to the two new companies whose stock will have been distributed to the Warner stockholders. There is no basis for assuming that any court would, at that time have jurisdiction over the necessary parties, including the two transferee corporations; so as to be able to decree an appropriate substitute for the Warner guaranty. On the other hand, the court below has indisputable jurisdiction with respect to Appellant's claim. It has jurisdiction over Warner and in the Consent Judgment has required that the two new companies consent to be bound by the provisions applicable to them and to be subject

² See Statement of Warner.

to the jurisdiction of the court with respect to the construction, modification, carrying out of, and enforcement of compliance with, the Consent Judgment (Section VI, C and D and Section XI, B, Exhibit 2 to Appellant's Statement of Jurisdiction, pp. 27, 54-55).

C.

Appellees' contentions in opposition to Appellant's right to intervene are without merit.

1. Appellees contend that Appellant's position with respect to an equivalent substitute for the Warner guaranty is without equity because upon dissolution of Warner it is proposed that Appellant will be given the guaranty of the new Theatre Company and there is no showing that such guaranty "would not be such an equivalent" and it "might be not only adequate but even more than equivalent because the theatre company will be freed from the fluctuations of the distribution business". (United States' Motion to Affirm.) Neither the Consent Judgment nor the plan of reorganization submitted to stockholders contains any provision to the effect that Appellant will have the guaranty of the new Theatre Company. Such a suggestion had been made informally by Warner and was referred to at the hearing. There are, however, numerous answers to the suggestion. (a) It is obvious that the guaranty of the new Theatre Company would not be the equivalent of a guaranty of Warner; half a loaf is not the equivalent of a whole loaf. (b) For many reasons it is wholly unforeseeable whether a guaranty of the new Theatre Company would be "adequate".³ (c) The question is not one of

³ For example, it is common knowledge that the impact of television on the motion picture theatre industry and particularly on theatre attendance is serious and immeasurable.

Again, the defendants in this cause, including the Warner defendants, are parties to a multitude of anti-trust treble damage

adequacy of the substitute but of equivalence.⁴ (d) Appellant is entitled to have the equivalent substitute for the Warner guaranty determined by the court and should not be relegated to what the United States or Warner considers equivalent or adequate.

2. The United States says it would be opposed to a guaranty by the new Picture Company of the obligations of a subsidiary of the new Theatre Company because the new Picture Company would have an interest in the success of the subsidiary and that would be contrary to the purpose of the Consent Judgment which is to separate the exhibition business from the production and distribution business of Warner. While it is the contention of Appellant that any interest of the new Picture Company in the exhibition business resulting from a guaranty of the new Picture Company would be unsubstantial and inconsequential, it is obvious that the objection of the Government is an argument on the merits of the very question sought to be raised by Appellant's Pleading in Intervention and should be determined by the court which made the judgment and is best able to determine its underlying policy.

3. It is urged by Appellees that Appellant is not bound by the Consent Judgment. This contention is completely unrealistic. Manifestly, Appellant is hit by the Consent Judgment, its rights and interests in the guaranty of

suits. Mr. Kenneth C. Royall, former Secretary of War and now of counsel for Twentieth Century-Fox Film Corporation, testified before the House Judiciary Anti-Monopoly Sub-Committee on April 13, 1951, that damage suits involving a total of 200 million dollars are now pending against the motion picture industry and placed the value of the industry at between 400 and 500 million dollars.

⁴ See *Continental Insurance Company v. United States, Reading Company, et al.*, 259 U. S. 156, 172-173, (1922), referred to in Appellant's Statement of Jurisdiction. P/2

Warner are to be destroyed by it and there is no way that Appellant can challenge or avoid the Consent Judgment or the distribution of the property of Warner or the dissolution of Warner.

4. Appellees' contention that the claim of Appellant was asserted prematurely has been answered by showing that Appellant has no other adequate remedy (pp. 6-7, *supra*). Reference is made by Appellees to a statement of counsel for Appellant on the hearing below that "it may be that we are here prematurely". The context makes it clear that all that was meant by counsel was that it might be premature to hear the application until the Warner plan of reorganization was formulated. Counsel said:

"Now, what is going to happen from here on, I assume, is that the Warner people are going to be preparing a proxy statement. That proxy statement will have to set forth in considerable detail what they propose to do with the assets, how they propose to take care of the liabilities of these companies. They will be confronted with this problem, will have to meet it and will have to solve it. We may be of assistance in solving it."

"So that my practical suggestion is that this matter be deferred for three or four weeks, adjourned, to see if we can arrive at a solution."

The postponement was opposed by the United States and Warner and was denied and when the Court announced its decision denying intervention Appellant's request that the denial be without prejudice was also denied. The Warner proxy statement subsequently mailed to stockholders, which is on file with the Securities and Exchange Commission⁵ and in which the plan of reorganization is set forth,

⁵ See Warner Statement.

did not provide any solution of the problem. It contains a general statement that the new Theatre Company will assume liabilities and obligations of Warner relating to assets transferred to it, and the following:

“Holders of contracts with and guarantees by Warner may claim that both of the New Companies are liable on such obligations, and one such claim has been made. The validity and the amount of claims which may be made against the New Company which does not assume such obligations is indeterminable.”

The Consent Judgment contains, in Section XI, B, a provision retaining jurisdiction of the cause “for the purpose of enabling any of the parties and their successors to this Consent Judgment, and no others” to apply to the court for further orders or direction, etc. (Statement of Jurisdiction, pp. 54-55). Appellant was therefore by the terms of the Consent Judgment precluded, after its entry, from making any application for relief.

Accordingly Appellant in seeking to intervene was not premature.

5. The Government and Warner have referred to a remark by the court below at the hearing that “there must have been a great many situations like this in this case”. Counsel for Appellant replying to this suggestion, said “While I appreciate that this client (sic) [plan] takes the familiar form of plans that have been already approved, I think there was no comparable situation to this in either the Paramount case or the RKO case.” At this point the court interrupted, saying “We shall have to deny this application.” Had counsel completed his statement he would have said that he had previously canvassed the subject with counsel for Paramount and counsel for RKO and had been

est in the State Theatre would be inconsistent with and preclude the relief sought by him on his pending appeal to the Court of Appeals for the Third Circuit.

In *Partmar Corporation v. United States*, 338 U. S. 804. (1949), the petitioner was the lessee of the Paramount Theatre in Los Angeles under a lease containing a provision giving Paramount the right to terminate the lease upon cancellation or termination of a franchise agreement under which the lessee agreed to exhibit Paramount pictures for an extended period. The Final Decree in this cause of December 31, 1946 having outlawed franchise agreements of all defendants, Paramount gave notice of termination of the lease and brought an action in the United States District Court in Los Angeles to recover possession of the theatre. Defendant answered, denying Paramount's right to terminate the lease and its right to possession of the theatre. While this action was pending and at issue, the lessee sought to intervene on the hearing in the court below on the Paramount Consent Judgment. The relief sought was that Paramount be required to divest itself of the theatre and also that there be added to the injunction provisions in the consent judgment against franchises "a minor complementary prohibition against dispossessing an innocent lessee by enforcing a condition incident to an exclusive dealing requirement". The petitioner did not complain because his franchise agreement had been rendered unenforceable by the Consent Judgment but sought to have the court below interpose to relieve it from the consequences of its voluntary agreement that Paramount should have the right to terminate the lease upon the happening of such contingency. Moreover the right of Paramount to terminate the lease was being litigated in the action between the parties then pending in Los Angeles. With respect to divestiture of the theatre, petitioner's contention was that

the theatre had been acquired by monopoly practices and that the mandate of this Court on the first appeal of this cause as to divestiture of the theatre interests had not been fully carried out. Questions of public interest only were involved in this contention and the public interest was adequately represented by the Department of Justice.

When thus analyzed, it is clear that these cases are inapposite and are in no wise precedents for the denial of Appellant's motion for leave to intervene.

Conclusion.

It is respectfully submitted that the motion to affirm and the motion to dismiss should be denied and that the order of the Court below denying Appellant's motion to intervene should be reversed.

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SEP 19 19

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT.

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UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER
BROS. PICTURES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT.

Opinion Below.

No opinions were delivered by the court below in connection with the judgment and order appealed from.

Grounds of Jurisdiction of this Court.

This is a direct appeal from a final judgment (R. 8-31) and from an order (R. 31-2) denying Appellant's application for intervention in this action.

1 The action was brought by the United States against the principal motion picture producers, distributors and exhibitors charging them with violations of Sections 1 and 2 of the Sherman Antitrust Act. It was tried by a three-judge court pursuant to the Expediting Act of February 11, 1903, as amended (15 U. S. C., Sec. 28).

The cause as against the so-called Warner defendants, i.e., Warner Bros. Pictures, Inc. (hereinafter called Warner), Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, was terminated with a Consent Judgment on January 4, 1951 and severed (R. 223-4). The judgment was consented to by the Warner defendants and was entered after a hearing on Appellant's motion for leave to intervene, and its denial.

Statutory Provisions Conferring Jurisdiction.

Jurisdiction of this Court of this direct appeal is conferred by Section 2 of the Expediting Act (15 U. S. C. Sec. 29), which provides:

"In every civil action brought in any district court of the United States under any of said Acts, [including sections 1 and 2 of the Sherman Antitrust Act] wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

and Title 28 (U. S. C. Sec. 2101), which provides in part:

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

Exclusive jurisdiction of this Court of this appeal is established by *United States v. California Canneries*, 279 U. S. 553, 557-560 (1929) in which a decision of the Court of Appeals of the District of Columbia on an appeal from an order denying intervention in an antitrust suit brought by the United States was reversed on the ground that the Court of Appeals was without jurisdiction since under the

Expediting Act an appeal lies only to this Court from the final judgment in such an action.

The Appeal Was In Time.

The Consent Judgment was signed January 4, 1951 and entered January 5, 1951. (R. 8-31) Appellant's intervention, denied orally on January 4, 1951 (R. 221, fol. 208-27) was denied by formal order made and entered February 26, 1951. (R. 31-32) The petition for appeal herein (R. 119-120) was filed March 2, 1951 and was allowed on the same day. (R. 122)

Intervention Was Claimed As Of Right and the Judgment and Order Denying Such Claim Are Appealable.

Appellant's right to intervene was asserted under clauses 2 and 3 of Rule 24(a) of the Federal Rules of Civil Procedure which are as follows:

“(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: *** (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.”

and also under Rule 24(b), the pertinent provisions of which are as follows:

“(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: *** (2) when an applicant's claim or defense and the main action have a question of law

or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

This Court recently considered the appealability of denials of applications for intervention under Rule 24(a) which provides for intervention as of right and under Rule 24(b) which relates to permissive intervention and said:

"Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., et al.*, 331 U. S. 519, 524-525 (1947).

Affirmances by this Court of orders denying intervention in relation to the final decree as to all defendants in this cause (*U. S. v. Paramount Pictures, Inc., et al.*, 334 U. S. 131, 178 (1948)) and in relation to the final consent judgment as to the Paramount defendants (*Ball, Trustee v. U. S.*, 338 U. S. 802 (1949); and *Partmar Corporation v. U. S.*, 338 U. S. 804 (1949)) are direct precedents establishing jurisdiction of this appeal. [The inappropriateness of these decisions as precedents for the denial of Appellant's application to intervene is shown at pages 14-16 of Appellant's brief herein in opposition to the motion of the Government to affirm and the motion of Warner to dismiss.]

In *Allen Co. v. Cash Register Co.*, 322 U. S. 137, 142 (1944) this Court dismissed an appeal from an order denying intervention in an antitrust action brought by the United

States on the ground that it was but an order and not the final judgment. It was noted; however, that a final decree had been entered in the cause prior to the allowing of the appeal and this Court said:

*** * if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment *** (322 U. S., at p. 142).

The Consent Judgment appealed from is the "final decree" in this cause as to the Warner defendants and it and the order appealed from are attacked because Appellant has been wrongfully denied intervention.

The jurisdiction of this Court would seem to be clear and is tacitly conceded by the Government which moved not to dismiss but to affirm.

That substantial questions are involved will be shown in the argument herein on the merits.

Statement of the Case.

The Issue.

Appellant leased a theatre property to one of Warner's sub-subsidiaries in 1928 for a term of 98 years at a minimum rental of \$300,000 per annum. The present unexpired term of the lease is 75 years. The tenant's obligations under the lease are guaranteed by Warner.

Under the Consent Judgment Warner is to be dissolved after transferring all of its theatre assets to a New Theatre Company and all of its production and distribution assets to a New Picture Company and the issue by said companies of their capital stock directly to stockholders of Warner.

Appellant thus loses the Warner guaranty. It was to protect its rights in respect of the guaranty that Appellant sought to intervene.

History of the Action.

This action was commenced by the United States in 1938 against the principal motion picture companies, including the Warner defendants, who were charged in the complaint with violations of Sections 1 and 2 of the Sherman Anti-trust Act. A decree adjudicating that the Sherman Act had been violated was entered (*U. S. v. Paramount Pictures, Inc., et al.*, 70 F. Supp. 53). All parties appealed. The decree was affirmed by this Court, but the cause was remanded for further consideration by the trial court of the questions of divorcement of theatre holdings by the distributor defendants and of divestiture by the theatre holding companies of theatres which might be the illegal fruits of their antitrust violations: *U. S. v. Paramount Pictures, Inc., et al.*, 334 U. S. 131 (1948).

After further proceedings in the court below a decree was entered on February 8, 1950 (R. 1-8)* which required each of the major defendants** (including the Warner defendants) to submit a plan for the ultimate separation of its distribution and production business from its exhibition business. It also provided for the submission of plans for the divestiture of theatre interests in compliance with the decision of this Court. On appeals by the Government and defendants that decree was affirmed by this Court. *Loew's Inc., et al. v. United States*, 339 U. S. 974 (1950).

* There are also included in the record the opinion of the Court below (R. 42-74B), (85 F. Supp. 881) which preceded said final decree of February 8, 1950, and the findings of fact and conclusions of law (R. 75-117) filed with it.

** Except RKO defendants and Paramount defendants, against whom consent decrees had theretofore been entered.

Consent Judgment Against Warner Defendants.

Instead of following the procedure prescribed in the aforesaid decree with respect to plans of divorcement and divestiture, the Government and the Warner defendants worked out between them the Consent Judgment (R. 8-31) from which Appellant has appealed. By its terms it superseded the prior decrees and is the final judgment in the action with respect to the Warner defendants. (R. 9, Sec. I)

The Consent Judgment (R. 25, Sec. VI, A) required Warner to present to its stockholders within 90 days a plan of reorganization to effect divorcement of its theatre assets located in the United States from its production and distribution assets. The plan of reorganization, it was required, should provide: (a) that all of said theatre assets should be transferred and assigned to a New Theatre Company; (b) that all of said production and distribution assets should be transferred and assigned to a New Picture Company; (c) that the New Theatre Company and the New Picture Company should each distribute its common stock pro rata to stockholders of Warner in exchange for the assets received by it; and (d) that Warner should thereupon be dissolved.

The Consent Judgment also required Warner defendants unconditionally to divest themselves of some 50 theatres, and to divest themselves of numerous other theatres upon conditions stated in the decree. (R. 13-25, Sec. V, 1-8).

The concluding paragraph of the Consent Judgment is as follows:

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties and their successors to this consent judgment, and no others, to apply to the Court at any time for such orders or direction as may be necessary or appropriate for

the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief." (R. 30, Sec. XI, B)

Appellant's Situation and Its Application to Intervene.

Appellant is the landlord of the very valuable property on which is located the Strand Theatre at Broadway and 47th Street in New York City. The Tenant is Stanley Mark Strand Corporation. All of the obligations of the Tenant under the lease* are unconditionally guaranteed by Warner which owns approximately 99% of the capital stock of Stanley Company of America, which owns all of the capital stock of the Tenant. The lease is for a term of 98 years beginning January 1, 1929 and ending December 31, 2026. It provides for an annual rental until the end of 1952 at the rate of \$300,000 per annum. Thereafter and for successive periods of 21, 21, 21 and 11 years, respectively, the annual cash rental is to be 5% of the appraised value of the land or the annual rental payable during the last year of the preceding period, whichever is greater. In addition the Tenant is obligated to pay taxes, water rates, assessments, insurance and other charges. The lease provides for the alteration and improvement of the present buildings on the premises by the Tenant at an estimated cost of \$1,000,000 and requires the Tenant to pay to Appellant as security against its default in respect of such obligation the sum of \$100,000 per annum beginning December 15, 1948 until \$1,000,000 has been so deposited. Three such payments have been made, the last on December 15, 1950. (R. 33-34, par. 2; 36, 37, 38, par. 2, 3, 6, 7)

* The lease has been amended several times (R. 37-38, par. 5-6) in respects not here material, and as used herein the lease means the lease as amended.

The minimum cash obligations of the Tenant to Appellant under the lease during the remaining 75 years of the term are in excess of \$23,000,000, exclusive of taxes, water, assessments, insurance and other charges which the Tenant is obligated to pay. All obligations of the Tenant under the lease are, as above stated, unconditionally guaranteed by Warner.

The Strand Theatre covered by the lease is not among those of which Warner is required to divest itself by the Consent Judgment appealed from. Neither the lease nor the guaranty was condemned by, and neither was mentioned in, that judgment. The lease, therefore, is to continue as a valid agreement between Appellant and Tenant for the remaining 75 years of the term. However, Appellant is to be deprived of the security for the lease, namely, Warner's guaranty of performance of all obligations of the Tenant under the lease. This results from the requirement of the Consent Judgment that all assets of Warner be transferred to two new companies, that all of their common stock issued in exchange therefor be distributed by them pro rata to the stockholders of Warner, which shall thereupon be dissolved. (R. 25, Sec. VI, A)

Learning of the hearing on the proposed Consent Judgment, Appellant sought to intervene to have the court preserve its rights under the Warner guaranty or provide an equivalent substitute. Its application to intervene was brought on for hearing by order to show cause (R. 32-3) applied for in order that it would be heard when the Consent Judgment was presented to the court. (R. 33, 35, par. 6) Appellant's application was supported by an affidavit (R. 33-36) of its counsel and by a proposed pleading in intervention (R. 36-41) setting forth its claim.

After alleging the facts with respect to the lease and Warner's guaranty of all obligations of the Tenant there-

under and the Consent Judgment and the proposed reorganization of Warner provided for therein (R. 36-39, par. 2-8), Appellant alleged that the proposed plan of reorganization would destroy and deprive Appellant of its rights in, to and under the guaranty "which is a valid, subsisting obligation, unrelated to any antitrust violations by Warner or any other defendant". (R. 39, par. 9).

It was averred that such destruction was unnecessary to full compliance by the Warner defendants with the decree of the court of February 8, 1950 (*supra*, p. 6, R. 1-8), that said decree afforded to Warner wide latitude in formulating a plan to comply with its divorce ment provisions and that the plan provided for in the Consent Judgment was selected by Warner as most advantageous economically or otherwise to Warner's stockholders. (R. 39, par. 9 and 10)

It was alleged that the proposed Consent Judgment, although providing for the transfer by Warner of all of its assets and for its dissolution, contained no provision for the preservation or protection of Appellant's rights in respect of the Warner guaranty, or for an equivalent substitute therefor and that no such provision was or would be made in or in connection with the plan of reorganization or the transfer of the assets of Warner or its dissolution. (R. 39-40, par. 11)

It was averred that unless the Consent Judgment or other order in the cause and/or the plan of reorganization provided for such preservation or protection or equivalent substitute, valuable rights of Appellant would be destroyed to its immediate, great and irreparable damage and Appellant would be deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. (R. 40, par. 12)

Appellant asserted its right to intervene as of right and also its right to permissive intervention under Rule

24 of the Federal Rules of Civil Procedure, *supra*, p. 3.
(R. 40, par. 13, 14)

Appellant alleged it had no adequate remedy except by intervention in the action (R. 40-41, par. 15), and prayed that it be permitted to intervene and that either (a) the court refrain from signing the Consent Judgment until it and the Warner plan of reorganization were amended to assure preservation of Warner's guaranty obligations or to provide a fully equivalent substitute therefor which should include an assumption of such obligations jointly and severally by the two new transferee corporations, or (b) such preservation or equivalent substitute be provided for by a separate order, and that Appellant have such other, further and different relief as might be just, equitable and proper. (R. 41).

Appellant's application to intervene was heard by the court below on January 4, 1951 immediately following the presentation of the Consent Judgment and was denied and Appellant's request that the denial be without prejudice was also denied. (R. 221, fol. 208-27) The Consent Judgment was thereupon signed (R. 222-3, fol. 208-30) and a formal order denying Appellant's application was made on February 26, 1951. (R. 31-32)

The plan of reorganization prescribed in the Consent Judgment was submitted to Warner stockholders and approved by them at a meeting held February 20, 1951. (R. 224) The plan as set forth in the proxy statement mailed to stockholders, copies of which are of record in the office of the Securities and Exchange Commission* did not (as Appellant had alleged it would not) preserve or protect or provide an equivalent substitute for the Warner guarantee. After enumerating certain obligations to be assumed by the New Theatre Company and the New Picture Com-

* Warner Statement Opposing Jurisdiction, p. 4.

pany, respectively, but not including the Warner guaranty of Appellant's lease, the plan as set forth in the proxy statement contains the following (p. 6):

"The New Theatre Company will assume all other liabilities and obligations of Warner [Warner Bros. Pictures, Inc.] relating to the assets transferred to it without regard to the date such liabilities and obligations were incurred. The remaining liabilities and obligations of Warner will be assumed by the New Picture Company.

"Holders of contracts with and guarantees by Warner may claim that both of the New Companies are liable on such obligations, and one such claim has been made. The validity and the amount of claims which may be made against the New Company which does not assume such obligations is indeterminable.

"For all purposes under this Plan, the determination by Warner of the allocation to each of the New Companies of liabilities and obligations shall be final and conclusive."

The stockholders were also advised that rulings had been procured from the Commissioner of Internal Revenue, to be confirmed by closing agreements with the Treasury Department, to the effect that the reorganization would be a "reorganization" within the meaning of Section 112(g) (1) of the Internal Revenue Code and would be tax-free to the two new companies and to the stockholders of Warner. (id. p. 6)

Specifications of Errors.

The assignments of error (R. 120-121) which Appellant urges are summarized as follows:

The court below erred in denying intervention claimed as of right under Rule 24(a) of the Federal Rules of Civil

Procedure; in denying intervention claimed under the permissive provisions of Rule 24(b) of said Rules, and such denial was an abuse of discretion; in failing to provide for the preservation of the rights and property of Appellant in respect of the Warner guaranty; in failing to provide an equivalent substitute for said guaranty; and in declining to hold that the Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

Summary of Argument.

I. Appellant was entitled as of right to intervene in the action to assert its claim.

A. The representation of Appellant's interest by existing parties was inadequate and Appellant is bound by the Consent Judgment.

1. Representation of Appellant's interest by the existing parties was inadequate.
2. Appellant is or may be bound by the Consent Judgment.

B. Appellant is so situated as to be adversely affected by a distribution or disposition of property which is in the custody or subject to the control or disposition of the Court.

II. Appellant was entitled to permissive intervention and the denial thereof was an abuse of discretion.

A. Appellant's claim and the main action in respect of the Consent Judgment had a question of law or fact in common.

B. Appellant's intervention would not have unduly delayed or prejudiced the adjudication of the rights of the original parties.

- C. The denial of Appellant's application to intervene was an abuse of discretion.
- III. Appellant has no adequate remedy except by intervention.
- IV. Appellant is entitled to a judicially ascertained equivalent substitute for the Warner guaranty.
- V. The Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law.

ARGUMENT.

Appellant repeats* that the sole purpose of its intervention was to have the court award it relief in respect of the Warner guaranty whose destruction was being brought about. It did not seek to delay the making of the Consent Judgment. It did not and does not seek in any manner to interfere with or obstruct the distribution of the property of Warner or its dissolution as required by the Consent Judgment. It did not and does not question the propriety of, or seek in any manner to have modified, the remedies imposed by the Consent Judgment. Appellant's contention was and is that it is entitled to have the court below in this cause ascertain and order an equivalent substitute for the guaranty of Warner. The substitute prayed for is the guaranty of both new companies to which the Consent Judgment requires all of the property of Warner to be transferred.

In the following argument it will be shown that Appellant was entitled as of right to intervene, that the denial of Appellant's application for intervention was an abuse of discretion; that Appellant has no adequate remedy except by intervention, and that the relief prayed is appropriate and should be awarded as a matter of justice and equity.

* Appellant's brief in opposition to motions, pp. 6-7.

I.

Appellant was entitled as of right to intervene in the action to assert its claim.

Appellant's attempted intervention was "upon timely application." Rule 24(a), Federal Rules of Civil Procedure, *supra*, p. 3.

Until the formulation and presentation to the court of the Consent Judgment appealed from, Appellant had no reason to seek the aid of the court for the protection of its rights with respect to the Warner guaranty. The decree of February 8, 1950 (R. 1-8) required the submission by Warner of "a plan for the ultimate separation of its distribution and production business from its exhibition business". (R. 5, Sec. IV, par. 1) That decree did not require the transfer of all assets of Warner to newly organized corporations and the dissolution of Warner. It was the plan selected by the Warner defendants and agreed to by the Government and incorporated in the proposed Consent Judgment which for the first time placed the Warner guaranty in jeopardy. Appellant moved promptly on learning of the hearing on the proposed Consent Judgment and brought on its application for intervention to be heard at the same hearing and before the making and entry of the Consent Judgment.

A.

The representation of Appellant's interest by existing parties was inadequate and Appellant is bound by the Consent Judgment.

Clause (2) of Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention of right "when the representation of the applicant's interest by existing par-

ties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

1. Representation of Appellant's interest by the existing parties was inadequate.

The primary function of the Department of Justice in an antitrust action is to represent the public interest. Nevertheless, as the agency of the Government charged with the enforcement of the antitrust laws it, as well as the court, is under the duty to have proper regard for the interests of innocent third parties in the formulation of decrees against violators of those laws. *Standard Oil Company of New Jersey v. U. S.*, 221 U. S. 1, 77-78 (1911); *U. S. v. American Tobacco Co.*, 221 U. S. 106, 185 (1911); *U. S. v. Union Pacific Railroad Co.*, 226 U. S. 470, 477 (1913).

"* * * one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." (*Standard Oil case, supra*, at p. 78)

To whatever extent the Government may be charged with any duty of representing Appellant, its representation was in fact inadequate. It opposed the intervention.

Warner clearly had a duty to represent, and did represent the interests of its stockholders. In connection with the Consent Judgment and the plan of reorganization required by its provisions, it also had a duty to represent creditors. That its representation of Appellant as a contingent creditor was inadequate is readily shown.

(a) It opposed Appellant's intervention.

(b) The interests of the stockholders represented by Warner were adverse to Appellant's interests. The plan of reorganization incorporated in the Consent Judgment which eliminated Warner's guaranty of the lease was not required by the decree of February 8, 1950, which was

affirmed by this Court.) It was a plan selected by Warner from among others under which Warner's guaranty would have continued, because it would not result in tax liability for Warner stockholders, whose interests were paramount with Warner. Warner's representation of the adverse interest of stockholders, to which Appellant's interest was subordinated, without more, establishes that its representation of Appellant was inadequate under Rule 24(a)(2). *Mack v. Passaic National Bank & Trust Co.*, 150 F. (2d) 474 (C. A. 3rd, 1945); *International Brotherhood of Teamsters v. Keystone Freight Lines*, 123 F. (2d) 326 (C. A. 10th, 1941).

(c) The right of Appellant to enforce the Warner guaranty against both the New Picture Company and the New Theatre Company or to follow the assets into their hands (see *infra*; p. 25) has been challenged because, it is claimed, any such liability on the part of the New Picture Company in respect of a theatre lease would be inconsistent with the purpose of the Consent Judgment to separate Warner's business of exhibition from its production and distribution interests. (R. 220, fol. 208-25) Warner's representation of Appellant's interest was inadequate in failing to safeguard such right or to provide an equivalent substitute therefor. Omission to act has been held sufficient to show inadequacy of representation for purposes of Rule 24(a)(2). *Wolpe v. Poretsky*, 144 F. (2d) 505 (C. A., D. C. 1944).

Manifestly, Warner's representation of Appellant with respect to remedies was inadequate:

2. Appellant is or may be bound by the Consent Judgment.

The binding effect of the Consent Judgment on Appellant with respect to its contract with Warner is obvious and unavoidable.

Appellant's rights under the guaranty as against Warner will be destroyed as effectively as though they were expressly dealt with in the Consent Judgment. The reorganization plan will be consummated. The two new companies will be organized. Warner's assets will be transferred to them. Warner will thereafter be dissolved. All of this will be done pursuant to, and if necessary by enforcement of, the Consent Judgment.

Under a subsequent discussion of the lack of any adequate remedy except intervention (*infra*, p. 25) we deal with the futility of the pursuit of Warner's assets in the event of a default years hence. But even in that connection, the statement of Government counsel on the hearing below that it was unalterably opposed to placing the New Picture Company (the recipient of Warner's production and distribution assets) in the position of a guarantor of a theatre (R. 220, fol. 208-25), is advance notice of the Government's position that an attempt to follow those assets would be contrary to the provisions of the Consent Judgment. Certainly the Government intends that Appellant shall be bound.

It is enough under Rule 24(a)(2) that Appellant will be indirectly bound or that its rights will be substantially affected by the Consent Judgment. *Mack v. Passaic National Bank & Trust Co.*, 150 F. (2d) 474 (C. A. 3rd, 1945), *supra*, p. 17; *White v. Douds*, 80 F. Supp. 402 (S. D. N. Y. 1948).

B.

Appellant is so situated as to be adversely affected by a distribution or disposition of property which is in the custody or subject to the control or disposition of the Court.

Clause (3) of Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as of right "when the applicant is so situated as to be adversely affected by a dis-

tribution or other disposition of property which is in the custody or subject to the control or disposition of the Court or an officer thereof".

Manifestly Appellant will be adversely affected by the disposition and distribution of the assets of Warner and of the shares of stock to be issued by the new companies to Warner stockholders in exchange for such assets. Instead of having an enforceable guaranty of Warner backed up by all of its assets, which Appellant confidently relied upon as ample security for the lease obligations, Appellant finds that Warner, the guarantor, is shortly to be without any assets and soon thereafter will cease to exist. And Appellant is warned by the Government that any effort by Appellant to assert any claim under the guaranty against the assets transferred to the New Picture Company will be opposed because the recognition of such claim would be in conflict with the provisions of the Consent Judgment.

It would seem equally clear that the property, the distribution and disposition of which adversely affects Appellant, was "subject to the control or disposition of the court". It is noteworthy that this clause in Rule 24(a) as originally adopted by this Court related in terms only to property "in the custody of the court" and that the words "or subject to the control or disposition" were added ten years later by amendment. This circumstance adds emphasis to the words supplied by the amendment. Certainly the court below directed the disposition of the Warner assets and the stock of the new companies by its prescription of the plan of reorganization in the Consent Judgment and Warner by its consent thereto subjected all of its assets to the disposition of the court. The requirements as to the plan were specific: (a) that all Warner theatre assets should be transferred and assigned to the New Theatre Company; (b) that all Warner production and distribution assets

should be transferred and assigned to the New Picture Company; (c) that the two new companies should distribute their common stock pro rata to the stockholders of Warner in exchange for the assets so received; and (d) that thereupon Warner should be dissolved. (R. 25, Sec. VI, A)

The provisions of the Consent Judgment with respect to the distribution and disposition of the assets of Warner and the stock of the new companies are no less effective and evidence no less authority of the court in respect of such distribution and disposition than would be the case had the court taken the assets and stock into its custody through a trustee appointed for the purpose of carrying out its mandate. The court fixed a time limit of 27 months within which these provisions must be complied with and retained jurisdiction of the cause for the purpose, among others, of carrying out and enforcing compliance with, and punishing violations of, its judgment. (R. 8, Sec. IX)

II.

Appellant was entitled to permissive intervention and the denial thereof was an abuse of discretion.

Appellant claimed the right to intervene under the permissive provisions of Rule 24(b) of the Federal Rules of Civil Procedure as well as of right under Rule 24(a). Appellant contends that the court below erred in denying such claim and that such denial was a plain abuse of discretion reviewable by this Court.

Rule 24(b) of the Federal Rules of Civil Procedure, in so far as material, provides:

“(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim

or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

A.

Appellant's claim and the main action in respect of the Consent Judgment had a question of law or fact in common.

Appellant's complaint was that the Consent Judgment, while in effect decreeing the destruction of Appellant's rights under the Warner guaranty, made no provision for a substitute therefor. Appellant's prayer was that in the Consent Judgment or by separate order the court should grant relief to Appellant in respect of the guaranty by ascertaining and awarding an equivalent substitute therefor, or such other relief as the court might deem just and proper. Appellant contended that it was the duty of the court which was bringing about the destruction of its guaranty security to provide for a substitute therefor. Appellees opposed this contention and the court in denying intervention disclaimed any responsibility for the resulting injury to Appellant. Whatever justification there may be in framing a decree in a Government antitrust action for ignoring the possibility that its provisions may grievously and irreparably affect property rights of innocent parties, it is submitted that when a situation such as that of Appellant is brought to the attention of the parties and the court before the decree is signed, there is a duty to deal with it and grant relief either in the decree or by separate order. That issue was presented by Appellant and was common to its claim and the main action in respect of the final action therein, namely, the signing of the Consent Judgment.

B.

Appellant's intervention would not have unduly delayed or prejudiced the adjudication of the rights of the original parties.

On the hearing in the court below it was made clear that Appellant had no desire to disturb or delay the making of the Consent Judgment. Counsel for Appellant stated, "We do not think it is necessary, and I want to say at the outset that we do not think it is necessary to disturb this decree which you are about to enter." (R. 218, fol. 208-21) Again he stated, "The Government is wrong in thinking that we are opposing dissolution. I don't think we would be in a position to oppose dissolution on the signing of this decree. That is not our position." (R. 222, fol. 208-29)

That Appellant was not seeking to delay the signing and entry of the Consent Judgment, is also shown by its counsel's suggestion at the hearing that its motion to intervene be adjourned for three or four weeks. (R. 218, fol. 208-22, 23)

C.

The denial of Appellant's application to intervene was an abuse of discretion.

The court below, by the provisions of the Consent Judgment about to be entered, was depriving Appellant of its guaranty held as security for the Tenant's obligations under a lease which had 75 years to run with minimum cash rentals of \$300,000 per annum aggregating (with required security deposits) upwards of \$23,000,000. We will show (*infra*, pp. 25-27) that Appellant had no adequate remedy except by intervention in the action in which the Consent Judgment was being entered.

It was suggested that if Appellant's intervention were allowed it would open the door to all kinds of claims under

leases, employee's contracts, etc. (R. 221, 222, fol. 208-28, 29). In the case of such contracts, however, a very different situation is presented. Usually a novation can be agreed upon by the parties; but if not, the employee, lessor, lessee or other contractor will have an immediate remedy against Warner. In the case of Appellant on the other hand, no cause of action on the Warner guaranty will arise until there is a default under the lease, which may occur many years after Warner's dissolution.

It was also suggested at the hearing that Warner had other situations similar to Appellant's and that the allowance of Appellant's intervention "would merely be an invitation for other persons to come in". (R. 220, fol. 208-25-26) Whether there are other comparable situations Appellant does not know. Its counsel was advised there were none in Paramount and RKO and was not advised that there was any other such situation in Warner. (See Appellant's brief in opposition to the motions of the Government and Warner, pp. 13-14) However, the possibility or fact (if it be the fact) that there may be others should not deprive Appellant of its right to intervene. Appellant asserted its right. Others did not.

Appellant suggests that the denial of its application may be explained by the attitude generally of the court below with respect to intervention in Government antitrust cases as evidenced by the statement of one of the judges "And I told the applicant* that I had no idea we would grant any intervention. We never have." (R. 220, fol. 208-26)

Rule 24 of the Federal Rules of Civil Procedure makes no exception of Government antitrust cases with respect to interventions of right or permissive interventions. In

*On Appellant's presentation of the order to show cause. (R. 32)

U. S. v. Terminal Railroad Association of St. Louis, 236 U. S. 194 (1915) over the Government's opposition this Court allowed intervention on the appeal by persons not parties to that antitrust suit who claimed to be adversely affected by the decree which was formulated. This Court said:

"The challenge by the United States of the right to hear the intervening petitioners is without merit, since even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights." (p. 199)

Among other instances of interventions in antitrust cases are *Continental Insurance Co. v. U. S., Reading Co., et al.*, 259 U. S. 156 (1922); and *Missouri-Kansas Pipe Line Co. v. U. S.*, 312 U. S. 502 (1941). The final decree in the last cited case expressly reserved to a third party affected by its provisions a right upon proper application to become a party.

The aversion of the court below; and of the Government, to intervention in antitrust cases is understandable where such intervention might interfere with the prosecution of the actions by the Government in the interest of the public. It is not justified in the case of Appellant whose property rights are destroyed with no other adequate remedy available to it now or in the future.

*** * The discretion of the chancellor in permitting or refusing intervention is by no means absolute. If the party seeking intervention shows such an interest in the litigation as to involve the protection of valuable rights and is without remedy elsewhere, the court should not refuse leave to intervene. ***

California Co-op Canneries v. U. S., 299 Fed. 908, 913 (C. A., D. C. 1924).

In *U. S. v. Radice*, 40 F. (2d) 445 (C. A. 2nd, 1930) the court said:

"It is true that, where an application for intervention is denied by the chancellor in the exercise of a sound discretion, the order is said to be non-appealable; but, as intimated in the case last cited, [*Credits Commutation Co. v. U. S.*, 177 U. S. 311] there may be cases where intervention is so essential to preservation of the petitioner's rights that denial of it is reviewable by appeal."

It is submitted that intervention is essential for the preservation of Appellant's rights, that the denial of its application was an abuse of discretion and is reviewable by this Court on this appeal. See *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., et al.*, 331 U. S. 519, 524-525 (1947), *supra*, page 4.

III.

Appellant has no adequate remedy except by intervention.

Rights of creditors in the property of a corporation are as a matter of substantive law superior to those of the stockholders and

"* * * any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of * * * creditors comes within judicial denunciation." *Louisville Trust Co. v. Louisville, etc. Ry.*, 174 U. S. 674, 684 (1899).

In some instances the creditor's superior substantive rights can be enforced by following corporate assets into the hands of transferees. *Northern Pacific Railway Company v. Boyd*, 228 U. S. 482 (1931). Such remedy, however, is here wholly inadequate, even if the right of Appellant to follow the assets of Warner and to enforce claims

arising out of the guaranty against both new companies were not challenged by the Government, as it has been. (See *supra*, p. 18).

The lease guaranteed by Warner has 75 years yet to run. No claim will arise under the guaranty unless and until there is a default under the lease. Such default might not occur for 20 or 50 or 70 years. The futility of such remedy upon a default under the lease occurring many years hence, with all the changes in assets and ownership which will inevitably occur meanwhile, is at once apparent. Moreover, ordinarily a creditor cannot follow and proceed against transferred assets of a corporation until judgment is obtained against it. *Pierce, et al. v. U. S.*, 255 U. S. 398, 403 (1921), citing *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371 (1893). This would be the case whether Appellant desired to follow the physical assets of Warner in the hands of the new companies or the stock of those companies in the hands of Warner's approximately 27,000 stockholders. But such a judgment against Warner could not be obtained years hence in view of the provisions of Section 42 of the General Corporation Law of Delaware,*

* "Sec. 42. Continuation of Corporation After Dissolution for Purposes of Suit, Etc.—All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-year period and until any judgments, orders, or decrees, herein shall be fully executed."

under which Warner is incorporated, limiting the continuance of a corporation to a period of only three years after its dissolution for the purpose of suing and being sued.

It was suggested in the court below that Appellant would have its remedy in the dissolution proceedings of Warner. (R. 221, fols. 208-27) But there will be no court proceedings. Dissolution can be, and generally is, effected by corporate action alone. Moreover, any such action will take place after the transfers of assets to the new companies and the distribution of their stock to the stockholders of Warner. Nor is there any assurance that any court would then have or be able to obtain jurisdiction over the necessary parties, including the two transferee corporations, so as to adjudicate Appellant's rights as against them in respect of the Warner guaranty.

Only in the court below by intervention can adequate relief be awarded to Appellant in respect of the Warner guaranty. The court below unquestionably can properly adjudicate Appellant's claim. It has jurisdiction over Warner and can require it to cause the two new companies to assume its guaranty obligations and to submit themselves to the jurisdiction of the court for the purpose of enforcing such requirement. It is submitted that all of this can and should be done now before the transfer of the Warner assets and their dissipation.

IV.

Appellant is entitled to a judicially ascertained equivalent substitute for the Warner guaranty.

- In the prayer for relief in its pleading in intervention, Appellant asked in substance that the court provide a judicially ascertained equivalent substitute for the Warner guaranty, which should include an assumption of the

guaranty jointly and severally by the New Picture Company and the New Theatre Company. (R. 41) The relief prayed is an altogether appropriate means of recognizing and giving effect to the substantive rights of Appellant as a creditor referred to *supra*, page 25.

There is direct precedent in Government antitrust cases supporting Appellant's right to have the court below ascertain and provide an equivalent substitute for the Warner guaranty which the Consent Judgment is destroying.

In *Continental Insurance Company, et al. v. United States, Reading Company, et al.*, 259 U. S. 156 (1922), this Court dealt with a plan for dissolving a combination which had been held unlawful in an action brought by the United States under the Antitrust Act and the Commodities Clause of the Interstate Commerce Act. This Court had previously (253 U. S. 26) directed that a combination with the Reading Company of four companies, including a coal company and a railway company, be dissolved so that each of the companies would be independent of the others. The Reading Company and the coal company had jointly given a mortgage covering property of both the coal company and the railway company. In stating the principle to be applied to that situation, this Court quoted "as expressing our view" the following from an unreported opinion* attributed to the Court of Appeals of the Sixth Circuit in a phase of *United States v. Lake Shore & M. Ry. Co.*, 203 Fed. 295:

"One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the Anti-

* This decision, by a three-judge District Court for the Southern District of Ohio, three Circuit Judges sitting, was subsequently reported in 281 Fed. 1007 (1916), the quotation appearing in a footnote at pp. 1012-3.

Trust Law or the commodities clause, and such that the mortgage serves practically to aid in tying them together, must be deemed to hold his mortgage subject to the contingency that if the complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the court charged with such enforcement may take control of that item, free it from the consolidating tendency of the mortgage, and substitute therefor its judicially ascertained equivalent." * * * " (p. 172)

As a substitute for the general mortgage, this Court directed that the Court below determine the values of the properties subject to the lien of the mortgage belonging to the respective companies, that their respective liabilities on the bonds and the liens on their properties be reduced proportionately and that provision be made for separate foreclosures on default. Realizing that this might not provide for the bondholders an equivalent substitute for their security, this Court said:

"We leave it to the District Court to determine what, if any, injury to the security this modification of the terms of the debt and mortgage may cause and to compensate for it by such a payment to the bondholders by either or both companies as may seem equitable and convenient." (p. 174)

The principle was applied in that case in respect of a mortgage which was condemned by this Court as "the indispensable instrument of the unlawful conspiracy". Concerning the mortgage this Court said:

"* * * Nevertheless, spread all over the face of the general mortgage, was the information and notice of the union of the railway and coal properties for the very purpose which is the head and front of

the offending under the Anti-Trust Law and which requires this court to dissolve the illegal combination. The general mortgage was the indispensable instrument of the unlawful conspiracy to restrain interstate commerce." * * * (p. 172)

If bondholders with such notice of the offending character of their mortgage security were entitled to and received the solicitous care and protection of the court, *a fortiori* should Appellant have received consideration and been awarded relief in respect of its security, the Warner guaranty, which is unrelated to any antitrust violation and which is an accidental casualty of the remedy employed by the court for the Warner defendants' antitrust violations.

V.

The Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law.

The Consent Judgment, entered without notice to Appellant, and the denial of its motion for leave to intervene without opportunity to present its claim and be heard, will deprive Appellant of its property rights in respect of the Warner guaranty without due process of law in violation of the Fifth Amendment to the Constitution of the United States. This is done by action of the court with the active consent of the Government, both of whom disclaim any responsibility whatever to Appellant.

Such disclaimer is sought to be justified on the ground that the guaranty of the New Theatre Company, which it is said is to be provided on dissolution of Warner, should be adequate. The question under the due process clause, however, is not one of possible adequacy of the suggested voluntary substitute for the Warner guaranty, but of full equiv-

alent value judicially ascertained and awarded by the Court as just compensation.

One is not compensated for property taken by having restored half or less than half its value.* It could with as much validity be contended that Appellant will be adequately protected without any security for the obligations under the lease because the tenant is solvent and there is no prospect of its ever defaulting.

Appellant's position is not dissimilar to that of the applicant for intervention in *California Co-op Canneries v. U. S.*, 299 Fed. 908 (C. A., D. C. 1924) whose petition to intervene was held to have been improperly denied. Because of its peculiar pertinence, the quotation from the opinion in that case contained in Appellant's Statement as to Jurisdiction** (p. 10) is repeated here.

"*** When an equity court, in the exercise of its jurisdiction, makes a decree which, in determining the rights of the parties, enjoins one of them from carrying out a lawful contract with persons not parties to the suit, and gives effect to a cancellation clause of such contract, it is the duty of the court, if it retains jurisdiction of the case, as in this instance, to permit the intervention of the contracting party, who is not a party to the original suit, and who is

* In an article in the August 13, 1951 issue of "LIFE", page 107, the head of the theatre circuit of one of the defendants in this action is quoted as predicting "that 40% of the country's theatres will close in the next five to seven years." The article continues: "Others, even more pessimistic, have estimated the fatalities at up to 90%." See also reference to the serious and immeasurable impact of television on motion picture theatre attendance and the multitude of antitrust treble damage suits now pending against the motion picture industry, in Appellant's brief in opposition to motions (footnote, pp. 10-11).

** In that Statement this quotation was unaccountably and mistakenly attributed to Mr. Justice Rutledge.

detrimentally affected by the decree, and to give him an opportunity to be heard.

"As we have observed, without intervention appellant would be left remediless. Valuable contract rights have been stricken down, without notice to appellant or an opportunity to be heard. It is a fundamental principle of our jurisprudence that, before private rights may be affected by judicial decree, the party in interest must have due notice and an opportunity to be heard. Upon the strict observance of this principle rests the security of the citizen in the enjoyment of life, liberty, and property; otherwise, these rights could be divested without due process of law." (p. 914.)

CONCLUSION.

The denial by the court below of Appellant's application for intervention should be reversed with instructions to the court below to award to Appellant the judicially ascertained equivalent of the Warner guaranty and otherwise to provide full compensation for the destruction of said guaranty.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *et al.*

Appellees;

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

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UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER
BROS. PICTURES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF APPELLANT.

1. Appellant's motion for leave to intervene was timely.

The Government does not question the timeliness of the motion.

The Warner Appellees appear to contend that Appellant was on notice from the time of the commencement of the action in 1938 that the guaranty which it seeks to protect was in jeopardy and should not be permitted to postpone a motion for leave to intervene until the eve of final judgment (Br. pp. 2-4).

The premise is not sound. Appellant was not a party to the action. It had no notice of its commencement or of any of the proceedings subsequently had therein. But assuming knowledge on the part of Appellant that the Govern-

ment's complaint prayed for a divorce from production and exhibition, that was not notice to Appellant that its rights in respect of the guaranty were involved. Such divorce could be accomplished without a dissolution of Warner and without destroying Appellant's guaranty.

An attempt on the part of Appellant to intervene in the cause at any time before its rights were threatened would have been premature. It was not until the formulation and presentation to the court of the proposed Consent Judgment which provided for the divorce from production and exhibition by means of a reorganization requiring a transfer of Warner's assets to two new companies and the dissolution of Warner, that there was any threat to Appellant's rights.

2. Appellant "is or may be bound" by the Consent Judgment

With respect to Clause 2 of Rule 24(a), the Government makes no claim that Appellant's interest is adequately represented and argues only that Appellant is not "bound" by the decree.

If the Government's construction of the phrase "is or may be bound by a judgment in the action" were to be adopted, Clause (2) would be rendered virtually meaningless. The argument of the Government is that in an action *in personam* one is bound by a judgment only where it operates against him as *res judicata* of his rights, and that a judgment so operates only against parties to the cause and persons in privity with them and not against persons whose rights are adverse (Br., pp. 15-16).

Obviously an applicant for intervention is not a party to the cause and no judgment entered in the cause could ever operate as *res judicata* of his rights. Privity in connection with the doctrine of *res judicata* applies only to

persons who have succeeded to the rights of parties to the action subsequent to its commencement. 50 C. J. Sec. page 324.

Plainly the rule was never intended to have so narrow an application. The language relied upon by the Government in *Cameron v. President and Fellows of Harvard College*, 157 F. (2d) 993 (C. A. 1st, 1946) (Br., p. 17) is not supported by any citation of authorities in the opinion or by the Government in its brief.

Far from applying a strict and narrow interpretation of the term "bound", the courts have made it clear that Rule 24(a)(2) is to be liberally interpreted, and that the term "bound" as used in the Rule is not the narrow concept of *res judicata* as the Government contends. (Br., p. 16)

Persons who may only be indirectly bound and whose interests are adverse to, rather than in privity with, the parties to the main action, are entitled to intervention as of right under Rule 24(a)(2). *United States v. C. M. Lane Lifeboat Co., Inc.*, 25 F. Supp. 410, 411 (E. D. N Y., 1938), aff'd 118 F. (2d) 793 (C. A. 2nd, 1941), Pet. for cert. dis. 314 U. S. 579 (1941); *Wolpe v. Poretsky*, 144 F. (2d) 505, 507 (C. A. D. C., 1944); *Champ v. Atkins*, 128 F. (2d) 601, 602 (C. A. D. C., 1942); *White v. Douds*, 80 F. Supp. 402, 405 (S. D. N. Y., 1948). Indeed, the clause "is or may be bound" in this subdivision of Rule 24(a) has been interpreted as requiring only that the intervenor be "affected" by the decree. *Mack v. Passaic National Bank & Trust Co.*, 150 F. (2d) 474, 477 (C. A. 3rd, 1945).

In *United States v. C. M. Lane Lifeboat Co., Inc.*, *supra*, intervention was allowed to a petitioner whose interest was adverse where the judgment "though it would not directly bind the petitioner, would in the last analysis, do so indirectly." (25 F. Supp. at p. 411)

The contention of the Government is in direct conflict with the decision of this Court in *United States v. Terminal Railroad Association of St. Louis*, 236 U. S. 194 (1915), (Appellant's Main Br., p. 24). The action was an *in personam* antitrust action. Any judgment therein would not be *res judicata* as to the petitioners, and there was no privity. Nonetheless the petitioners were entitled to intervene on the ground that the decree "might operate prejudicially to their rights". See also an article on intervention by Raoul Berger, 50 *Yale L. J.* 65, at page 85.

With respect to the words "is or may be bound by a judgment in the action" it is stated in 6 *Cyclopedia of Federal Procedure* (2nd ed.) page 488:

"A natural meaning would of course be that they imply *res judicata*. But a more rational point of view for the purposes at stake is that they need mean only that the effect of the judgment would be prejudicial. So construed, they merely carry into present practice the orthodox requirement of intervention practice generally that the nature of the intervenor's interest must be such that he will gain or lose by the operation of the judgment."

The prejudicial effect of the judgment on Appellant's rights is pointed up by the inconsistencies in the Government's Brief itself. The Government in one breath states that the Consent Judgment here does not bind Appellant (Br., p. 15 *et seq.*) and in the next, in response to the suggestion that Appellant is entitled to an assumption of the guaranty by the two new companies, it says (Br., p. 26) "The parties to the main action regard the consent decree as barring assumption of Warner's guaranty by the new picture company * * *."

The Government's argument (Br., pp. 18-19) that Appellant is free to assert in other proceedings the rights which it has under the guaranty will be discussed later. (*Infra*, pp. 10-11)

The argument of the Government that "the new theatre company's guaranty (through assumption of Warner's guaranty) should be found to constitute a full equivalent" (Br., pp. 19-20); and the argument of the Warner Appellees that the petition alleged no facts to show that the guaranty of the new theatre company would not be a reasonable equivalent (Br., pp. 5-6), have no foundation in fact and are not relevant to the issues presented.

There is no such thing as a guaranty of the new theatre company, and contrary to the statement in the brief of Warner Appellees (pp. 1, 5), no such guaranty has been tendered. Warner has not agreed to cause the new theatre company to give any such guaranty. It is under no obligation to do so, and the Consent Judgment does not require it. The suggestion that such a guaranty might be forthcoming was gratuitously made by counsel for the Government upon the argument in the statutory court (R. 218, fol. 208-21), and such a guaranty has been the subject of informal discussion. It has no more substance than that.

In any event, this is not the time nor the forum for a discussion of what would or what would not be an equivalent substitute for the Warner guaranty consistent with the purposes of the Consent Judgment. Contrary to the assumption of Warner Appellees (Br., pp. 1-2) the court has exercised no discretion in respect of that issue. It can only be determined by a trial of the issues involved in Appellant's pleading in intervention and a judicial decision rendered upon the evidence submitted. The only issue here is whether or not Appellant has a right to intervene in the cause to have the merits of its claim judicially determined.

3. The property of Warner is "subject to the control or disposition of the Court" and Appellant is "adversely affected" by the "distribution or other disposition" of said property.

As to the alternative ground for intervention provided for by clause (3) of Rule 24(a), the Government contends that it is applicable only where there is a *res* which the court is administering or exercising control over and where the intervenor has an interest therein (Br., pp. 21-23). To support this contention it argues that the action against Warner is *in personam* and that its failure to make the transfers of property provided for in the Consent Judgment, even though punished by citation for contempt, would not vest title to the property in the court.

In Appellant's main brief (pp. 19-20) it has been shown that the court below exercised as effective control over the property of Warner by directing its transfer to the two new companies as if it had actually taken possession of the property through a receiver or trustee.

To punish as a contempt any failure to transfer the properties as directed would probably be the least effective method of enforcing the Consent Judgment. A direct and more effective method would be to appoint a receiver or trustee and direct him to make the requisite transfers. Jurisdiction to invoke this procedure has been reserved.

Although the action may be technically one *in personam*, it partakes of many of the aspects of an action *in rem* by reason of its direct effect upon the disposition and distribution of the Warner properties, and if occasion requires can readily be converted into an action *in rem*.

The right to intervene under clause (3) is not limited to *in rem* actions and in actions where the disposition of property is or may be involved, intervention under clause (3) is permitted. *Tift v. Southern Railway Co.*, 159 Fed. 555, 558 (S. D. Ga., 1908).

Clause (3) does not specify that the intervenor must have an interest in the property in order to be "adversely affected". The broad inference sought to be drawn by the Government from its quotation (Br., p. 24) of dicta from the opinion of this Court in *United States v. California Canneries*, 279 U. S. 553, 556 (1929), that to intervene as of right the applicant must have "a direct and immediate interest in a *res* which is the subject of the suit" is unjustified. Ohlinger in his discussion of the Rule (3 *Ohlinger's Fed. Prac.*, 1948 ed., p. 482) says that such an inference "is not borne out by other decisions of the Supreme Court, nor by the decisions of the federal courts generally . . .", and cites and discusses numerous cases supporting the text.

Following the quotation by the Government (Br., p. 23) from 4 *Moore's Federal Practice*, page 45, with respect to the nature of an interest which will support an application for intervention, the text continues (pp. 45-46):

"It is 'not always easy to draw the line' as to when an interest is sufficient to give a lien for this purpose; but the tendency of the cases is apparently towards a liberal definition of ownership and lien."

After referring to certain cases where an absolute right to intervene obtained, the author said (pp. 47-48):

"But in another class of cases the petitioner's interest arises from an atypical transaction, and the lien, if any, depends upon equitable considerations. Thus, Indiana in building the Wabash & Erie Canal incurred certain indebtedness to Robertson for the performance of work on the canal, and to Johns for the destruction of his water right. It was agreed that an amount of money should be payable to Robertson out of rent received through the operation of the canal, and that Johns should be furnished a certain amount of water, rent free. Later,

the state, to meet the expense of building the canal, issued certificates of indebtedness. The holders of these certificates having brought a bill in equity which resulted in a sale of the canal, it was held that persons in the position of Robertson and Johns had an absolute right to intervene in the equity proceedings. [*French v. Garen*, 105 U. S. 509 (1881)] The lessor of a non-assignable lease, who alleged that he was owed a sizable amount for maintenance of the leased railroad, was held to have an absolute right to intervene in receivership proceedings, because the receiver had sold the lease and, furthermore, had made no provision for preferring the debt incurred by maintenance. [*Vicksburg, S. & P. Ry. Co. v. Schaff*, 5 F. (2d) 610 (C. C. A. 5th, 1925)] A petitioner claiming a contingent fee was said to have a like right of intervention in an accounting suit upon the theory of a lien on the fund in court: [*Barnes v. Alexander*, 232 U. S. 117 (1914)]”

In the last cited case, Mr. Justice Holmes, referring to the attorneys' contingent fee claim, said:

“Even if their lien was only inchoate when the suit was begun, which we do not intimate, they had a right to protect their interest and of course were not deprived of it by the plaintiff's reaching the result that they also desired. Having a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes” (232 U. S., at p. 123).

An equitable lien arising out of a contract, inchoate until judgment, relates back to the commencement of the action and affords a basis for intervention under Rule 24(a)(3). *Friedman v. Harris*, 158 F. (2d) 187, 188 (C. A. D. C., 1946); *Continental Casualty Co. v. Kelly*, 106 F. (2d) 841, 843 (C. A. D. C., 1939).

The transfer of the assets of Warner directed by the Consent Judgment gives rise to an equitable lien in favor of Appellant as a contingent creditor of Warner. *Coley v. M. I. Co., et al.*, 133 N. Y. 164 (1892); *Hurd v. N. Y. & C. Steam Laundry Co.*, 167 N. Y. 89, 95-96 (1901).

4. Appellant was entitled to permissive intervention and a denial thereof was an abuse of discretion.

The primary requirement for permissive intervention under Rule 24(b) is that the "applicant's claim or defense and the main cause have a question of law or fact in common." When the Court determined to decree the dissolution of Warner and the dispersion of its assets, it became necessary to a final disposition of the cause to frame a decree to carry that determination into effect. Two new issues were inherent in the framing of a lawful decree: First, an issue of fact as to whether such a decree would impinge upon the rights of third parties; and second, an issue of law as to the power of the Court to destroy or impair such rights. The issues were present. They cannot be eliminated merely by the failure of the parties to raise or contest them and the denial of intervention by any injured party who desires to do so. Those are the issues common to the Appellant's claim and the main action which Appellant claims the right to litigate.

Appellant has also pointed out (Br. in opposition to motions, pp. 6-7; Main Br., p. 22) that the granting of the application to intervene would have resulted in no delay in the entering or carrying out of the Consent Judgment. The relief to which Appellant is entitled in respect of its claim can be awarded by a supplemental order or orders without any modification of the Consent Judgment or delay in carrying out the plan of reorganization therein required. What is involved in Appel-

lant's intervention is the judicial ascertainment of the equivalent substitute for the Warner guaranty and the attaching of liability therefor on the transferee or transferees of the Warner assets.

Denial to Appellant of the right to intervene where, as here, no delay or prejudice to the adjudication of the rights of the original parties is involved, and particularly where, as has been shown (Main Br., pp. 25-27; and see discussion under 5 below), Appellant has no other adequate remedy, constitutes an abuse of discretion.

The marked difference between the situation of Appellant and contract creditors of Warner generally and the very substantial difference in the effect of the Consent Judgment on Appellant's rights and interest as contrasted with theirs, were pointed out in Appellant's main brief, pages 22-23.

5. Appellant has no adequate remedy except by intervention.

That there will be no court proceedings on dissolution of Warner (Appellant's Main Br., p. 27) is substantiated by the recitals in the Warner Proxy Statement (p. 8) that "under the Delaware statutes under which Warner is incorporated, such dissolution will require the affirmative vote of the holders of two-thirds of the stock having voting power. Since dissolution of Warner is an integral part of the Plan, an approval of the Plan will also require such two-thirds vote". It finds further substantiation in the affidavit of Edward K. Hessberg (R. 224) which was the basis of the order of severance of the Warner defendants herein, and which stated that the stockholders' meeting had been held and that more than 75% of the stock was voted in favor of approving the Plan of reorganization.

The Government's suggested remedy (Br., p. 39, footnote) of a proceeding on equitable principles against Warner's transferees after default by Appellant's lessee, has been shown to be wholly inadequate (Main Br., p. 26).

A determination in a declaratory judgment action against the Warner defendants, the other remedy suggested by the Government, would not be binding on it. If in such action the equivalent substitute for the Warner guaranty were adjudged (in accordance with conceded equitable principles) to be the guaranties of both transferee companies, or if otherwise the decision were considered by the Government to be inconsistent with the Consent Judgment, it would doubtless apply under the reservation of jurisdiction clause of the Consent Judgment for injunctive relief against Warner and/or the transferee companies. Such application presumably would not be contested by Warner and Appellant's declaratory judgment would be nullified by injunction.

6. The Consent Judgment and the denial of intervention will deprive Appellant of property without due process of law.

The brief dismissal by the Government (Br., pp. 41-42) of Appellant's due process contention (Main Br., pp. 30-32) ignores the lack of notice to Appellant as an important element of due process, erroneously assumes that the hearing on Appellant's application to intervene is equivalent to a hearing on the merits of the issues of Appellant's claim, and repeats its contention that the judgment does not foreclose Appellant with respect to its rights under the Warner guaranty.

Conclusion.

The court below erred in denying Appellant's application for intervention and the relief specified in the Conclusion to Appellant's main brief should be granted.

Respectfully submitted,

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CHARLES E. MORE CLOPP CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

51

No. 668 25

SUTPHEN ESTATES, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

STATEMENT OPPOSING JURISDICTION

JOSEPH M. PROSKAUER,
R. W. PERKINS,

Counsel for Warner Bros.

Pictures, Inc., et al.

J. ALVIN VAN BERGH,
HAROLD BERKOWITZ,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950



No. 668

SUTPHEN ESTATES, INC.,

Petitioner-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WARNER BROS. PICTURES, INC., ET AL.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

STATEMENT, PURSUANT TO RULE 12, PARAGRAPH
3, OF THE REVISED RULES OF THIS COURT, BY
WARNER BROS. PICTURES, INC., WARNER BROS.
PICTURES DISTRIBUTING CORPORATION AND
WARNER BROS. CIRCUIT MANAGEMENT CORPO-
RATION, IN OPPOSITION TO JURISDICTION.

Warner Bros. Pictures, Inc., Warner Bros. Pictures Dis-
tributing Corporation and Warner Bros. Circuit Manage-
ment Corporation, pursuant to Rule 12, paragraph 3 of the
Revised Rules of this Court, submit the following state-

ment of the matters and grounds which make against the jurisdiction of this Court asserted by the Appellant.

Facts

Warner Bros. Pictures, Inc. (herein called Warner) produces motion pictures and owns corporations engaged in various phases of the motion picture business, including distribution and exhibition. It owns all the stock of Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation.

Appellant is the lessor of a theatre property in New York City known as the Strand Theatre. The property is leased to the subsidiary of a subsidiary of Warner, and the lease is guaranteed by Warner. The lease, which expires on December 31, 2026, is not in default and it is not contended that any default is threatened.

At an earlier stage of this litigation, the three-judge District Court handed down an opinion, 66 F. Supp. 323, and entered a decree, 70 F. Supp. 53, which this Court affirmed in part and reversed in part, 334 U.S. 131. After further proceedings, the District Court handed down an opinion, 85 F. Supp. 881, and entered a decree dated February 8, 1950. On a second appeal, this Court affirmed that decree without opinion, 339 U.S. 974.

The Decree of February 8, 1950 required, among other things, that each theatre-owning defendant should submit a plan "for the ultimate separation of its distribution and production business from its exhibition business" and that such plan "provide for the completion of such separation within three years from the date of entry of this decree."

After lengthy negotiations the Government and Warner agreed upon a Consent Judgment. This Judgment required that Warner should submit to its stockholders a Plan of Reorganization under which all of the theatre assets would

be transferred to a New Theatre Company, and all of the production and distribution assets would be transferred to a New Picture Company, and the New Companies would distribute their common stock pro rata to the stockholders of Warner Bros. Pictures, Inc., which thereupon would be dissolved. The reorganization must be completed within twenty-seven months. The Judgment provided that the two New Companies should be operated wholly independently of one another, and should have no common directors, officers, agents or employees, and enjoined each company from attempting to control or influence the business or operating policies of the other by any means whatsoever.

Before the proposed Consent Judgment was presented to the Court, Appellant moved for leave to intervene upon the ground that the Plan of Reorganization would destroy Warner's guarantee of its lease, and argument on this motion was had at the same time as the hearing on the Consent Judgment. Upon the argument Appellant stated, "It may be that we are here prematurely, but it seemed to us important to bring to the attention of the Court at our earliest opportunity the situation that we are confronted with."

Appellant requested the District Court to provide a "judicially ascertained equivalent" for the Warner guarantee, which should include guarantees by both the New Picture and the New Theatre Company.

It appeared at the hearing that the New Theatre Company would assume all the obligations of Warner relating to theatre assets, including the guarantee of Appellant's lease. Appellant's counsel, however, argued, "... I do not have the equivalent of the guarantee we now have, when we are asked to take the guarantee of the theatre company only." Counsel for the Government, opposing the motion to intervene, argued that the guarantee of the New Theatre Company would be adequate protection. As to Appellant's

request that the New Picture Company also guarantee the lease, counsel for the Government stated, "Now we are unalterably opposed to that because the very purpose of this judgment is to effect a complete separation of the picture company from the exhibition interests. To put the picture company in the position of a guarantor of a theatre is to give it an interest in the success of that theatre and to give it an interest in the exhibition business." It was pointed out that presumably many such guarantees would be involved. Counsel for Warner, likewise opposing the motion, argued that the guarantee of the New Theatre Company would be adequate.

The Court denied Appellant's motion for leave to intervene and the Judgment in the form consented to by the Government and the Warner defendants was signed and entered.

The Judgment contained a provision that it would be of no force and effect unless the proposed reorganization was approved by the Warner stockholders within ninety days. Accordingly a Plan of Reorganization, as above described, was prepared for approval by the stockholders. The necessary proxy statement was prepared and submitted to the Securities and Exchange Commission, and sent to approximately 27,000 stockholders. At the stockholders meeting, the Plan of Reorganization was approved by a vote of 5,079,833 shares in favor, and 41,579 against.

Thereupon, pursuant to the provisions of the Consent Judgment, the Court entered an order severing and terminating the litigation as against the Warner defendants.

No Appeal Lies from the Order Denying Appellant's Motion for Leave to Intervene. The Questions Presented Are Not Substantial.

None of the three cases cited by appellant supports its contention that this Court has or should take jurisdiction to review the Order herein.

In *United States v. California Canneries*, 279 U.S. 553, Armour and Co., after entering into a contract to buy canned fruit from California Canneries, consented to a decree in a government anti-trust suit under which Armour was prohibited from engaging in the business of selling canned fruit. Canneries moved for leave to intervene, asserting that the consent decree destroyed its contract. The trial court's decision denying the motion was reversed by the Court of Appeals. The case ultimately came to this Court which held that the Court of Appeals had no jurisdiction since, under the Expediting Act, appeals must be taken direct to the Supreme Court. In the course of its opinion this Court pointed out that the Court of Appeals had ignored "the decisions which hold that an order denying leave to intervene is not appealable. In re Cutting, 94 U.S. 15; Credits Commutation Co. v. United States, 177 U.S. 311; Ex Parte Leaf Tobacco Board of Trade, 222 U.S. 578, 581; In re Engelhard, 231 U.S. 646; City of New York v. Consolidated Gas Co., 253 U.S. 219; New York v. New York Telephone Co., 261 U.S. 312. * * *"

In *United States v. Paramount Pictures, Inc., et al.*, 334 U.S. 131, 177-178, the orders of the District Court denying leave to intervene were affirmed, but this Court expressly refrained from ruling whether it had jurisdiction to hear the appeals from such orders.

In *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, the consent decree contained a specific provision

granting petitioner-appellant a right of intervention. This case was distinguished on that specific ground when it was cited in *Allen Co. v. Cash Register Co.*, 322 U.S. 137, 142.

The present appeal is similar to an appeal taken from the denial of a previous application for leave to intervene in this litigation. It will be recalled that prior to the contested decree which was reviewed by this Court in *United States v. Paramount Pictures, Inc., et al.*, 334 U.S. 131, the parties had consented to a decree which contained provision for the arbitration of disputes arising in the motion picture industry (See 334 U.S. at p. 176). In *St. Louis Amusement Co. v. United States*, 326 U.S. 680, the appellants had sought leave to intervene in the *Paramount* case in the District Court, asserting they were injured by the operation of the arbitration system. The relief they sought was, among other things, that the consent decree be vacated insofar as it had created the arbitration system. Leave to intervene was denied and an appeal to this Court was docketed. This Court dismissed the appeal for want of jurisdiction, citing *United States v. California Canneries*, 279 U.S. 553, 556 and cases cited; *Allen Co. v. Cash Register Co.*, 322 U.S. 137, 142.

Similar appeals were taken from denials of motions to intervene in this case in opposition to the Consent Judgment of Paramount Pictures, Inc. This Court affirmed the orders denying intervention. *Ball, Trustee v. United States*, 338 U.S. 802; *Partmar Corporation v. United States*, 338 U.S. 804.

The authority of the *St. Louis Amusement Co.* case, *supra*, and of the cases there relied upon by the Court and the authority of the *Ball* and *Partmar* cases, thus clearly require that the instant appeal be dismissed for want of jurisdiction and because no substantial question is presented requiring review by this Court.

WHEREFORE, the appellees Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation respectfully ask that the appeal herein be dismissed.

April 5th, 1951.

Respectfully submitted,

(S.) JOSEPH M. PROSKAUER,

(S.) ROBERT W. PERKINS,

Counsel for Appellees,

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Warner Bros. Pictures

Distributing Corporation,

Warner Bros. Circuit

Management Corporation.

(S.) J. ALVIN VAN BERGH,

(S.) HAROLD BERKOWITZ,

Of Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

SUTPHEN ESTATES, INC.,

Petitioner-Appellant,

UNITED STATES OF AMERICA,

v. Plaintiff-Appellee,

WARNER BROS. PICTURES, INC., ET AL.,

Defendants-Appellees

PROOF OF SERVICE

Service of the foregoing Statement In Opposition To Jurisdiction Of The Supreme Court Of The United States and the receipt of a copy thereof are hereby acknowledged this 5th day of April, 1951.

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No. 66825

In the Supreme Court of the United States

OCTOBER TERM, 1950

SUTPHEN ESTATES, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MOTION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

SUTPHEN ESTATES, INC., PETITIONER-APPELLANT
UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WARNER BROS. PICTURES, INC., ET AL., DEFENDANTS-
APPELLEES

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court, appellee United States of America moves that the judgment and order of the district court be affirmed.

This is a direct appeal from an order entered on February 26, 1951 denying the appellant leave to intervene in a civil proceeding brought by the United States under Section 4 of the Sherman Act, against Paramount Pictures, Inc., and seven other leading distributors of motion-picture films and certain of their subsidiaries and from a consent judgment entered on January 5, 1951, terminating the civil proceeding. Appeal was allowed on March 2, 1951, and appeal papers were served

on March 6, 1951. Jurisdiction of the appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. The application for leave to intervene was made and denied under the following circumstances:

The principal proceeding was instituted by the United States in July 1938. Various violations of the Sherman Act were charged and comprehensive relief was prayed. On November 20, 1940, a decree was entered by consent against five of the defendant distributors—including Paramount Pictures, Inc.—and their defendant subsidiaries. The consent decree provided, *inter alia*, a trial period of three years for most of its provisions.

On August 7, 1944, the Government filed an application for modification of the consent decree. The answer of the consenting defendants denied any right to such relief and the case was set down for trial of all issues against all defendants. After the district court had entered a final judgment on December 31, 1946 (*United States v. Paramount Pictures, Inc.*, 70 F. Supp. 53 (S.D. N.Y.)), all the defendants appealed from the judgment. The United States also appealed upon the ground that the relief granted by the judgment was inadequate.

On May 3, 1948, this Court affirmed the judgment below in part and reversed it in part, and remanded the cause to the district court for further proceed-

ings in conformity with the Court's opinion. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131. The Court upheld the district court's findings as to defendants' violation of the Sherman Act and, on the question of relief, it affirmed many of the provisions of the district court's judgment. Other provisions of the judgment, however, were set aside upon the ground that they failed to give adequate relief.

On November 8, 1948, a decree was entered by consent against the RKO group of defendants. On March 3, 1949 a decree was entered by consent against the Paramount group of defendants. On February 8, 1950 the district court entered a judgment against all the other defendants. This judgment required divorcement of the production and distribution parts of the businesses of the three remaining integrated defendants from their theatre holding exhibition interests. It also required plans of divorce and divestiture to be filed. On appeal this Court affirmed that judgment. *Loew's, Inc., et al. v. United States*, 339 U.S. 974.

On January 4, 1951, a proposed consent decree against defendant Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, and Warner Bros. Circuit Management Corporation was presented to the court. The decree contains elaborate provisions designed to achieve divorce of Warner's exhibition activities from

its production and distribution activities. The divorceement is to be completed within 27 months.

On the same day on which the consent decree was submitted, appellant presented to the district court an application for intervention. The application set forth that the appellant had leased a theatre to a subsidiary of Warner Bros., Inc. on a long term lease and that Warner Bros., Inc. had guaranteed fulfillment of the obligations of the lease. Intervention was sought to have the judgment modified to provide that the guarantee be assumed both by the new company to be organized to take over the picture making and distributing assets, and the new company to be organized to take over the theatre assets. Appellant's motion for intervention was denied, and on January 5, 1951, the consent judgment was entered.

1. Appellant was plainly not entitled to intervene as of right. No statute of the United States gives appellant an unconditional right to intervene; it is not bound by the consent decree; nor will any property in which it has an interest be adversely affected by the consent decree.¹ See *Allen Calcul-*

¹ Rule 24(a) of the Rules of Civil Procedure provides:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

tators, Inc. v. National Cash Register Co., 322 U.S. 137, 140-141. And no provision of the consent decree gives appellant a right of intervention. Cf. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502. Appellant has no greater right to intervene in order to prevent divorce of Warner Bros., Inc. than would an ordinary creditor in a suit against his debtor by a third person. In either case the result of such suit might be to reduce the assets of the debtor but that is a risk inherent in being an unsecured creditor. As an unsecured potential creditor, appellant would have no standing to object to the dissolution of its guarantor by operation of law. And whatever rights appellant may have under the guarantee, it has no standing to demand that the judgment in the antitrust proceeding should protect it from any possible future loss. This is not to say that if appellant should at some time in the future suffer injury covered by the guarantee, it will be foreclosed from asserting in an appropriate tribunal any legal rights which it may possess against Warner Bros., Inc. or its successors in interest. But any assertion of injury now is premature.²

At the present time, even if it be assumed that appellant is entitled to the equivalent of its original

² Appellant's counsel appears to have been aware on the argument of the petition for intervention that the claimed injury had not yet occurred (Tr. 22):

"It may be that we are here prematurely, but it seemed to us important to bring to the attention of the Court at our earliest opportunity, the situation that we are confronted with."

guarantee, there is no showing that the offer to substitute a guarantee of the proposed theatre corporation³ would not be such an equivalent. The guarantee of the theatre holding company might be not only adequate but even more than equivalent because the theatre company will be freed from the fluctuations of the distribution business. In *Partmar Corporation v. United States, et al.*, 338 U.S. 804, this Court affirmed denial of intervention in a case where the claimed injury from the consent decree was at least as direct and certain as is the present one. The appellant in that case was a theatre lessee who was facing eviction as a direct consequence of the fact that his franchise agreement to exhibit Paramount films had been terminated by the consent decree.⁴

³ Although the court below denied formal intervention, it permitted appellant to be heard in support of its motion. The transcript of that hearing shows that appellant was unable to demonstrate that any specific injury to it would result from the divorcement. (Tr. 28):

"JUDGE GODDARD: How do you know that you won't receive complete protection?

"MR. SHIFFMAN: I don't know what complete protection is. We now have a guarantee of a company with all of the assets of the Warner organization behind it. The proposal now is that we take a guarantee of the new theatre company which is to have the theatre assets only, after many of the theatres have been divested. Presumably there will be a quid pro quo for them, but I do not have the equivalent of the guarantee we now have, when we are asked to take the guarantee of the theatre company only."

⁴ In two other previous instances this Court has affirmed denials of intervention in this same case. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 176; *Ball, Trustee v. United States*, 338 U.S. 802.

2. It is equally clear that the action of the district court in denying permissive intervention was proper. No conditional right of intervention is conferred by a statute, and the applicant's claim has no question of law or fact in common with the main action.⁵ Moreover, even if it be assumed that the court had power to permit intervention, Rule 24(b) provides that the court, in exercising its discretion, shall consider whether intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." The most important relief granted (as to Warner) by the consent decree is the divorcement of Warner's distribution business from its exhibition business. The relief is similar to that provided in the RKO and Paramount judgments. Thousands of theatres are involved, many of them under lease. As the district court noted at the time this matter was argued before it, "There must have been a great many situations like this in this case." To have

⁵ Rule 24(b) provides:

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

permitted landlords of theatres of the defendants in this case to interject themselves into the proceedings to assure no change in their own status quo, might have prevented this or any other decree being entered within any foreseeable period. These considerations alone plainly support the denial of intervention.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the order of the district court denying intervention should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 23, 1951.

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No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1951

SUTPHEN ESTATES, INC., APPELLANT

v.

UNITED STATES OF AMERICA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The district court did not render an opinion on denial of appellant's motion for leave to intervene. Two prior opinions rendered by the district court in the proceeding in which appellant sought to intervene are reported in 66 F. Supp. 323 (reversed in part and affirmed in part, 334 U. S. 131), and 85 F. Supp. 881 (R. 42-74), affirmed *per curiam*, 339 U. S. 974.

JURISDICTION

The district court entered a consent decree against Warner Bros. Pictures, Inc., and certain of its subsidiaries on January 4, 1951 (R. 8-30),

and entered an order denying appellant's motion for leave to intervene on February 26, 1951 (R. 31-32). The petition for appeal from this order and from the consent decree was filed and allowed on March 2, 1951 (R. 119-120, 122). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. Code 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. On May 14, 1951, this Court postponed the question of its jurisdiction of the appeal to the hearing on the merits (R. 226).

QUESTIONS PRESENTED

- (1) Whether appellant might be "bound" by the consent decree entered against Warner or might have been "adversely affected" by a disposition of property which was in the "custody" or "control" of the district court, so as to confer upon appellant a "right" to intervene under Rule 24 (a) of the Federal Rules of Civil Procedure.
- (2) Whether the claim on which appellant sought intervention and the main action had a question of law or fact in common so as to provide basis for "permissive intervention" under Rule 24 (b), and, if so, whether the district court's order denying intervention was an abuse of discretion.
- (3) Whether, apart from the Rules governing intervention, the district court was under a duty

to grant appellant the relief for which it sought intervention.

STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

SEC. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

Section 24 of the Federal Rules of Civil Procedure provides in part:

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * *. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

The proceeding in which appellant sought to intervene was brought in 1938 under Section 4 of the Sherman Act against the eight leading distributors of motion-picture films. In 1940 a consent decree, running for a trial period of three years, was entered against the five major defendants—Fox, Loew's, Paramount, RKO and Warner—who were exhibitors as well as distributors of films. At the end of the three-year period the Government moved for trial against all the defendants. The case was heard by a three-judge district court,¹ which held that all the de-

¹ Their respective corporate titles are Twentieth Century-Fox Film Corporation, Loew's Incorporated, Paramount Pictures, Inc., Radio-Keith-Orpheum Corporation, and Warner Bros. Pictures, Inc.

² The court was convened pursuant to the provisions of Section 1 of the Expediting Act, 32 Stat. 823, as amended by the Act of April 6, 1942, 56 Stat. 198, 15 U. S. C. 28.

fendants had violated the Act (*United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323). On appeal from the district court's judgment (reported in 70 F. Supp. 53), this Court affirmed in part and reversed in part, and remanded the cause for further proceedings in conformity with the Court's opinion. *United States v. Paramount Pictures, Inc.*, 334 U. S. 131.

Under the opinion of this Court, one of the major issues to be explored upon remand was whether the five majors were engaged in monopolizing or in a conspiracy to monopolize the exhibition of films (334 U. S. 166-175). Prior to the district court's determination of the issues committed to it by the remand, the Government and RKO² agreed upon the provisions of a consent decree, which was entered on November 8, 1948, disposing of all issues in the case as to RKO (R. 125-143). A consent decree against Paramount, terminating the cause as against it, was likewise entered prior to any adjudication by the district court on remand (R. 143-193).

The RKO and Paramount decrees each provided, among other things, that the defendant's exhibition business should be separated from its production and distribution business. This was to be effected by carrying out a reorganization which involved: (1) creating a new theatre company and a new picture company; (2) transfer-

² Each reference herein to a major defendant includes those of its subsidiaries named as defendants.

ring to the former the defendant's theatre assets and to the latter the defendant's other assets, in exchange for the stock of the two new companies; (3) dissolution of the defendant so that its stockholders should receive, on a pro rata basis, stock of the two newly created companies (R. 126, 140, 183-184).⁴

On July 25, 1949, the district court ruled that the major defendants' vertical integration had served to effectuate defendants' conspiracy to fix prices, runs and clearances, and that adequate assurance against further violations of the Act required divorcement of the defendants' exhibition business from their production and distribution business (R. 62-63, 66-68). A final judgment entered against the three remaining major defendants (Fox, Loew's, and Warner) on February 8, 1950, provided for the submission within six months of plans for such divorcement, which were to be completed within three years from date of entry of the judgment (R. 2, 5).

Negotiations between the Government and Warner resulted in agreement upon a consent decree to be in lieu of the judgment against

⁴ In each decree there were supplementary provisions designed to insure that the two newly created corporations should be operated wholly independently of one another. See Sections II-B, III-E, IV-V, VI-B of the RKO decree (R. 128-129, 139-141) and Sections IV-VI of the Paramount decree (R. 182-190).

Warner entered on February 8, 1950 (R. 8-31).⁵ This decree, in addition to general injunctive provisions (Secs. III-IV, R. 9-13) and detailed provisions for divestiture of theatres (Sec. V, R. 13-25), required Warner to submit to its stockholders, within 90 days after entry of the decree, a "plan of reorganization" to effect divorcement of its theatre assets from its production and distribution assets (Sec. VIA, R. 25). The decree states that such plan shall provide that all of Warner's theatre assets shall be transferred to a new theatre company and all of its production and distribution assets to a new picture company; that each of the new companies shall distribute its capital stock pro rata to Warner's stockholders, in exchange for the assets received by it; and that Warner shall thereupon be dissolved (Sec. VIA, R. 25). The new theatre company is not to engage in the distribution business, or the new picture company in the exhibition business, except with permission granted by the court upon a showing that competition in distribution or exhibition will not thereby be unreasonably restrained (Sec. VIB, R. 25). War-

⁵To allow more time to complete these negotiations, the time within which Warner should submit a plan for separating its exhibition business from its production and distribution business was, by stipulation, extended to January 15, 1951.

⁶Assets not within either of these categories were to be transferred to one or the other of the two new companies.

ner is to cause each of the new companies to file its consent to be bound by the terms of the decree applicable to it (Sec. VIC, D, R. 25-26), and within 27 months after entry of the decree, the two new companies are to be operated wholly independently of one another (Sec. VIIA, R. 26).

The divorcelement to be effected by the foregoing plan of reorganization was a crucial element of the consent decree. The decree provides that if Warner's stockholders shall not have approved the proposed reorganization within 90 days after entry of the decree, the decree "shall be of no further force and effect" and the cause "shall be restored to the docket without prejudice to either party" (Sec. I, R. 9).

The consent decree was presented to the district court on January 4, 1951 (R. 206-207). Two days earlier appellant had filed its motion for leave to intervene (R. 36-41) and had procured an order to show cause why its motion should not be granted (R. 32-33). The motion, which was supported by an affidavit of counsel (R. 33-36), alleges:

On December 31, 1928, appellant leased property in New York City on which the Strand Theatre is located for a term of approximately 98 years to Stanley Mark Strand Corporation, a wholly owned subsidiary of a corporation which is almost a 100% subsidiary of Warner (R. 36-37). The current rental, and the minimum rental for the remainder of the lease, is \$300,000 a year,

and the lessee is obligated to pay taxes; water rates, insurance premiums, etc. (*ibid.*). The original lease provided that the lessee would erect a new theatre and office building on the premises, but in December 1948 the parties agreed to substitute for this obligation an obligation to improve the present buildings on the premises at an estimated cost of \$1,000,000 (R. 37). The agreement also provided that, in order to secure this obligation, the lessee should deposit with the trustee \$100,000 a year for ten years, beginning December 15, 1948 (R. 38). Warner, by agreement made with appellant in 1931, guaranteed that the lessee would perform all the terms, covenants and conditions of the lease (R. 37) and Warner, as guarantor, consented to the modification of the lease made in December 1948 (R. 38).

Appellant's motion sets forth as ground for intervention that its rights under Warner's guaranty may be destroyed if, pursuant to the reorganization provided for in the consent decree, Warner distributes all of its assets and then dissolves (R. 40). The prayer for relief was (1) that the court refrain from signing the consent decree until it had been amended in such a way that it would either "assure preservation of" Warner's guaranty or provide a "fully equivalent substitute" therefor, or in the alter-

¹ Prior to the filing of appellant's motion to intervene, the lessee had made three such payments totaling \$300,000 (*ibid.*).

native, (2) that the court "by separate order" direct that Warner's guaranty obligation be preserved or that a fully equivalent substitute therefor be provided (R. 41).

At a hearing on January 4, 1951, the district court heard argument on appellant's motion for intervention and denied the motion (R. 217-222). At the same hearing the court approved the consent decree after its major provisions and purposes had been outlined by counsel for the United States (R. 207-216, 222). After the court had entered the consent decree and an order denying intervention, appeal was taken to this Court from said decree and said order (*supra*, p. 2).

SUMMARY OF ARGUMENT

I

Appellant had no right of intervention under Rule 24 (a) of the Federal Rules of Civil Procedure. Clause (2) grants such right when the applicant for intervention is or may be "bound" by the court's judgment, but appellant was not a party to the proceeding below nor did it assert rights as to which it was in privity with a party. The consent decree is not *res judicata* of appellant's rights, and the district court acted upon the basis that appellant would be free to assert in other proceedings the rights which it claims. And if, as the parties to the main action view the consent decree, it implicitly bars assumption of Warner's guaranty by the new picture company,

one of the two transferees of its property, appellant is not "bound" by the decree because it does not deprive appellant of any legally protected right. The decree does not prevent appellant from obtaining from the new theatre company, Warner's other transferee, the full measure of the legal right which it claims—a judicially ascertained equivalent of Warner's guaranty.

Appellant is also not within clause (3) of the Rule, which grants intervention when the applicant will be "adversely affected" by a distribution of property in the "custody" or "control" of a court. The antitrust action is an *in personam* proceeding against Warner and its property was not in the custody or control of the district court. In addition, appellant has merely an unsecured contract claim against Warner. It has no interest in or lien on Warner's property. Unless the applicant for intervention has a definite interest in property in the court's custody, he is not "adversely affected," within the meaning of the Rule, by the court's disposition of the property in its hands. Moreover, apart from appellant's lack of any property interest adversely affected, its contract claim is not adversely affected by the consent decree entered by the district court. Even if the decree bars assumption of Warner's guaranty by the new picture company, appellant is affected only in the sense that the assets standing behind the Warner guaranty are depleted to the extent of those which will pass

to the new picture company. But any final money judgment against Warner would likewise deplete its assets. Accordingly, if depletion of a debtor's assets by a court judgment is enough to give a right to intervene, any holder of a direct or contingent claim has the right to come into almost any action against his debtor or guarantor. Plainly the Rule on intervention of right was not intended to have this vast reach.

II

There was no basis for permissive intervention under Rule 24 (b) since appellant's claim and the main action had no question of law or fact "in common." Appellant's claim involved the liability of Warner's transferees on Warner's guaranty contract, whereas the main action involved the provisions to be included in the court's judgment in order to assure Warner's compliance with the Sherman Act. Appellant's claim did not involve these questions, and appellant has disclaimed any attack upon either the divorce-mem which the district court had adjudged to be requisite or the means for achieving it incorporated in the consent decree.

In any event, denial of intervention was not an abuse of discretion and hence is not reviewable. Various considerations furnish ample support for the court's exercise of its discretion. Intervention would have seriously interfered with and delayed adjudication of the rights of the parties in the main action, which has been long pending.

Appellant's claim of possible injury was speculative and determinable only in the light of unknown future factors. Appellant was free to obtain in other proceedings the judicial ascertainment of its rights which it sought to interject into the antitrust action against Warner.

ARGUMENT

Introductory Statement

The Court's jurisdiction of the appeal. An order denying intervention "depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable * * *. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable * * *."

Brotherhood of Railroad Trainmen v. Baltimore and Ohio R. R. Co., 331 U. S. 519, 524-525. See *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137; *United States v. California Cooperative Canneries*, 279 U. S. 553, 558. It is the Government's position that there was neither intervention of right nor an abuse of discretion in the instant case. Hence, if this appeal were solely from the order denying intervention and no final judgment in the main action had been entered, the Government believes that this Court would have no jurisdiction of the appeal.

* Cf. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502, 508, where denial of intervention rights specifically granted by a prior judgment was held to be a definitive adjudication and so appealable.

This is not, however, a separate appeal from the order denying intervention. The final judgment in the main action (the consent decree) has been entered and appellants have appealed from that judgment as well as from the order denying intervention. In these circumstances, the appeal should probably be treated as attacking the consent decree upon the ground of wrongful denial of intervention (*Allen Calculators* case, *supra*, at p. 142), so that this Court would have jurisdiction to review, but there must be affirmance of the judgment below if there was no intervention of right and no abuse of discretion in denial of permissive intervention (*Brotherhood of Railroad Trainmen* case, *supra*, at pp. 524-525).⁹

I

Appellant is not within the provisions of Rule 24 (a), which governs "intervention of right"

Clauses (1), (2), and (3) of Rule 24 (a) of the Federal Rules of Civil Procedure set forth the circumstances under which there is intervention as of right. While a third party has a right to intervene, apart from the categories defined by the Rule, if a prior judgment in the cause has granted it this right, in that situation the foundation of the right is the court's prior judgment and the matter lies outside the general doctrines of intervention codified in Rule 24 (a). *Missouri-*

⁹ We do not believe that the *California Cooperative Canneries* case, *supra*, is to the contrary. The context of the reference (279 U. S. at 556) to decisions holding denial of intervention not appealable indicates that the Court was speaking of *separate appeals* from denial orders.

Kansas Pipe Line Co. v. United States, 312 U. S. 502, 506-508. The present appellant neither has nor claims any right to intervention independent of the Rule and it can prevail on appeal only if it shows it has a right to intervention coming within the scope of Rule 24 (a).

Clause (1). This clause grants intervention of right "when a statute of the United States confers an unconditional right to intervene." No federal statute applicable to the proceeding below confers an unconditional right to intervene (*Allen Calculators Co., Inc. v. National Cash Register Co.*, 322 U. S. 137, 140-141), and appellant does not contend that it is within the scope of clause (1).

Clause (2). This clause grants intervention of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." There is a right to intervene only if both of these requirements are met.¹⁰ We propose to show that appellant cannot be bound by the consent decree entered by the district court and that appellant therefore has no right of intervention under clause (2).

Appellant was not a party to the proceeding below. It is thus not directly bound by the decree which the district court entered. It is like-

¹⁰ *Cameron v. President and Fellows of Harvard College*, 157 F. 2d 993, 996 (C. A. 1); *Moore's Federal Practice*, 2d ed., chap. 24, ¶ 24.8.

wise not indirectly bound as a privy of Warner. It asserts rights adverse to those of Warner, not rights bottomed on or derived from those of Warner. The consent decree entered against Warner therefore does not conclude appellant and is not res judicata of its rights under Warner's guaranty contract.

Where a court rules, as here, that a person seeking intervention has no "legal right" to intervene, a necessary premise of the ruling is that the judgment entered in the cause will not bind the person denied intervention. In *Crédits Commutation Co. v. United States*, 177 U. S. 311, 315, the Court quoted and "adopted" (p. 315) a statement in the opinion of the Circuit Court of Appeals that the rule is well settled that an order denying intervention "is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding."

In *Cameron v. President and Fellows of Harvard College*, 157 F. 2d 993 (C. A. 1), Harvard College had brought suit against the City of Providence alleging that there had been a misapplication of the income from property which a decedent had bequeathed in trust to the city and that, under the terms of the will, this misapplication constituted a forfeiture of the trust and the trust *res* passed to the college in trust for certain specified purposes. The district court

refused to permit the decedent's executrix and sole heir at law to intervene and the appellate court affirmed the order denying intervention. The court, in holding that there was no right to intervene under clause (2) of Rule 24 (a) said (p. 996) :

* * * the applicant cannot be bound by any judgment in that action since it is one in personam * * *. Thus any judgment therein can bind only the parties and those in privity with them, which the applicant is not.

In the present case the district court acted upon the basis that appellant would be free to assert in other proceedings its claimed right to obtain the equivalent of Warner's guaranty. Neither the court nor Warner's counsel viewed the consent decree as res judicata of appellant's rights. After Warner's counsel had stated (R. 220) :

What you are doing is to order the separation of these companies and a dissolution. We have to dissolve under the provisions of the State statute. And every State in its provisions about dissolution has provisions for taking care of such contingent obligations.

and had stated (R. 221) that "when we begin our dissolution proceedings under the State statute" the appellant "has every opportunity to be properly taken care of," there were the following re-

marks by members of the court and appellant's counsel (R. 221):

Judge HAND: We shall have to deny this application.

Mr. SHIPMAN: May I ask that it be denied without prejudice to another application, if you find we are hurt?

Judge HAND: No, you have got your proper remedies in these dissolution proceedings at other times.

Judge GODDARD: Doesn't the State law provide that?

The consent decree does not explicitly adjudicate the liability of Warner's transferees for its obligations. While the decree requires transfer of Warner's assets to two new companies and dissolution of Warner, it is silent on the subject of satisfying or fulfilling Warner's outstanding obligations. The decree allows flexibility in this respect and Warner, in the reorganization plan which it adopted, availed itself of the latitude thus given it.¹¹

Even if the consent decree implicitly bars assumption of Warner's guaranty by the new picture company, appellant is not thereby "bound" since it is free to obtain in other proceedings

¹¹ See Warner's proxy statement (p. 6), attached to its notice (dated January 11, 1951) of annual stockholders meeting. The proxy statement is on file with the Securities and Exchange Commission and is referred to and quoted from in

vindication of its rights under the guaranty. The farthest reach of these rights, and all that appellant demands, is judicial ascertainment and award of the "equivalent" of the guaranty. When the matter is put to judicial test the new theatre company's guaranty (through assumption of Warner's guaranty) should be found to

appellant's brief (pp. 11-12). The reorganization plan set forth in the proxy statement was approved by Warner's stockholders (R. 224-225).

The plan provides as follows for Warner's obligations and liabilities:

(1) Of Warner's \$9,546,000 of long-term notes payable to banks, the new theatre company is to assume one-fourth, and the new picture company three-fourths, of those outstanding at the effective date of reorganization.

(2) Of amounts payable as damages, settlements, legal fees and expenses arising from antitrust litigation, the new theatre company is to assume 100% of the liability if only Warner's exhibition business was involved, the new picture company 100% if only Warner's production or distribution business was involved, and the new theatre company 85% and the new picture company 15% if both Warner's exhibition business and its production or distribution business were involved.

(3) The new picture company is to assume liability for additional federal income or excess profits taxes assessed against Warner for years in which separate tax returns were filed, and its pro rata share of such taxes assessed on a consolidated basis.

(4) Each of the new companies is to assume all obligations of Warner relating to the assets transferred to it. And stockholders were advised in this connection that claims may be made that both of the new companies are liable on contracts with and guarantees by Warner, and that the "validity" and amount of such claims is indeterminable.

constitute a full equivalent,^{11a} and we later call attention to the indicated worth and earning power of the new theatre company (*infra*, pp. 35-36). The value of the theatre company's guaranty thereby indicated is the more striking when comparison is made with the value of Warner's guaranty at the time appellant obtained it through its contract with Warner dated June 5, 1951 (R. 37).¹² And while there may be hazards in the motion picture exhibition business, there were serious hazards in the integrated business of production, distribution, and exhibition in which

^{11a} Appellant has referred to upwards of \$23,000,000 as the minimum rentals payable by its lessee during the unexpired term of the lease (App. Br. 9, 22). The \$23,000,000 figure is accurate but without significance with respect to possible liability under Warner's guaranty. The measure of damages for breach of a long-term lease is "the present value of the rent reserved less the present rental value of the remainder of the term." *Connecticut Ry. & Lighting Co. v. Palmer*, 305 U. S. 493, 504; *Kuehner v. Irving Trust Co.*, 299 U. S. 445, 450.

¹² On August 29, 1931, shortly after the guaranty was given, the consolidated balance sheet of Warner and subsidiaries showed total assets of \$213,857,453, funded debt of \$104,898,927, and capital stock and surplus of \$88,845,711 (Moody's 1932 *Industrial Manual*, p. 2983). At that time, therefore, Warner's capital stock and surplus was only 40% of its total assets and its funded debt represented 49% of its total assets.

Applying the provisions of the reorganization plan to Warner's assets on August 31, 1950, the new theatre company would have total assets of \$92,113,628, funded debt of \$3,179,208, and capital stock and surplus of \$80,432,375 (p. 11 of Warner proxy statement). On the basis of these figures, its funded debt would be only 3% of total assets and its capital stock and surplus would be 87% of total assets.

Warner has been engaged.¹³

If, upon judicial test of appellant's rights in other proceedings, it should be held, notwithstanding the factors to which we have referred, that the new theatre company's guaranty would not in itself be the equivalent of Warner's guaranty, and if it should be further held, in accordance with the views of the parties to the main action, that the consent decree bars assumption of the guaranty by the new picture company, the "equivalent" which appellant claims may be otherwise obtained. The new theatre company might be required to agree to set aside funds in trust to secure fulfilment of its guaranty, or to agree to do so if its net assets or net current assets should fall below prescribed figures.¹⁴ Appellant is not "bound" by the consent decree, within the meaning of the Rule, when the decree, even under the most remote contingencies, will not operate to bar appellant from obtaining the full measure of its legal rights.

Clause (3). The last clause of Rule 24 (a) grants intervention of right "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

¹³ The hazards are illustrated by the *Paramount* case out of which the present appeal arose and by "the multitude of antitrust treble damage suits now pending against the motion picture industry" (App. Br. 31, note).

¹⁴ Compare the provision in appellant's lease as amended in 1948 requiring the making of such deposits to secure the lessee's obligation to alter and improve the leased property (R. 37).

We submit that in this case there was no property in the custody or control of the district court within the meaning of clause (3). There was no *res* which the court was administering or exercising control over. The antitrust action against Warner is an *in personam* proceeding and the court's duty is to enter a judgment against the defendant barring further violations of the statute. The consent decree entered against Warner required it to do certain things, including making certain property transfers. If it should wilfully fail to carry out these commands, it would be subject to punishment for contempt but such failure would not vest Warner's property in the court.

The district court obviously did not have control or custody of Warner's property prior to entry of the consent decree. It likewise did not obtain such control or custody upon entry of the decree. The entire decree, including its provisions as to property transfers, was to become a nullity if Warner's stockholders failed to approve the required reorganization of Warner within 90 days after entry of the decree (R. 9).

Appellant suggests that there is some significance in the change in the wording of clause (3) when the Rules of Civil Procedure were amended in 1946 (App. Br. 19). The original words were "property in the custody of the

court," and the 1946 amendment changed these words to "property which is in the custody or subject to the control or disposition of the court." The Committee Note on the change shows that it was not intended to broaden the general scope of clause (3).¹⁵

Appellant, in order to bring itself within clause (3), must establish not only that there was property in the custody or control of the district court, but also that it had an interest therein. In the absence of such interest, the applicant for intervention is not within the meaning of the Rule, "adversely affected" by the court's disposition of property subject to its control. A leading authority on the Federal Rules of Civil Procedure has stated with reference to the scope and application of clause (3):

What kind of an interest must a petitioner have in property subject to the control of the court before he can claim an absolute right to intervene? Obviously it must be an interest known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the

¹⁵ The Committee's Note on the amendment to subdivision (a) of Rule 24 reads:

"The addition to subdivision (a) (3) covers the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending."

type to be denominated a lien, equitable or legal.¹⁶

Clause (3) is not to be viewed as effecting a departure from the "well established principles" governing intervention of right, and it grants intervention of right only to persons having "a legal interest" in the property in the court's custody. *United States v. Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 120 (D. Del.) appeal dismissed *sub. nom.* *Missouri-Kansas Pipe Line Co. v. United States*, 108 F. 2d 614 (C. A. 3), certiorari denied, 309 U. S. 687. Further discussing clause (3), the court said (*ibid.*):

It would produce chaos to require the courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action.

In *United States v. California Cooperative Canneries*, 279 U. S. 553, 556, this Court referred to the decisions holding that an order denying leave to intervene is not appealable "except where he who seeks to intervene has a *direct and immediate interest in a res* which is the subject of the suit" [italics supplied].¹⁷ One of the cases

¹⁶ Moore, *Federal Practice*, 2d Ed., ¶24.09 [2]. Accord, *Gross v. M. & A. Ry. Co.*, 74 F. Supp. 242, 249 (W. D. Ark.); *Board of Commissioners of Sweetwater County, Wyo. v. Bernardino*, 74 F. 2d 809, 815-816 (C. A. 10), certiorari denied, 295 U. S. 731.

¹⁷ Since appeal rarely lies from denial of permissive intervention but does lie from denial of intervention which was of right, the words quoted above are a definition of intervention of right.

which the Court cited for this exception was *Swift v. Black Panther Oil & Gas Co.*, 244 Fed. 20, 30 (C. A. 8), which succinctly states the "well established principles" which were the basis of intervention of right prior to adoption of the Federal Rules of Civil Procedure. The court there said that intervention of right, as distinguished from permissive intervention, exists when—

the petitioner claims a *lien upon or an interest in specific property* in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court.

[Italics supplied.]

The present appellant has no interest in or lien on any of Warner's property. It merely has an unsecured contract right to hold Warner if appellant's lessee should fail to perform the terms and covenants of its lease. Appellant would acquire no interest in or lien on Warner's property upon the lessee's default. Even more patently it has, prior to default, no such interest or lien. The asserted right of intervention under clause (3) fails, therefore, both because Warner's property was not in the control or custody of the district court and because appellant had no interest in or lien upon any property of Warner.

Over and above the foregoing infirmities, appellant is not within clause (3) for the reason

that it is not so situated as to be "adversely affected" by the consent decree entered by the court below. The decree requires Warner to adopt a plan of reorganization providing for transfer of its assets to two new corporations and its dissolution. The very legal principle upon which appellant relies—that when a corporation transfers its business and assets to a newly created corporation having the same stockholders, outstanding obligations of the transferor may be enforced against the transferee¹⁸—means that a corporation succeeding to Warner's assets will be liable, without any express assumption of liability, upon Warner's guaranty contract.

The parties to the main action regard the consent decree as barring assumption of Warner's guaranty by the new picture company since otherwise there would not be the complete divorce from distribution from exhibition requisite to effective relief in the antitrust litigation. But when appellant entered into an unsecured contract by which Warner guaranteed a lease running for

¹⁸ Appellant's brief (p. 25), citing *Northern Pacific Ry Co. v. Boyd*, 228 U. S. 482. At pages 7-8 of its brief in opposition to motion to dismiss and motion to affirm the principle is more fully elaborated, and appellant also cited *Bankers Trust Co. v. Hale & Kilburn Corp.*, 84 F. 2d 401 (C. A. 2); *Calvin v. Washington Properties*, 121 F. 2d 19, 25 (C. A. D. C.); *Pearce v. Schneider*, 242 Mich. 28; *Male v. Atchison, T. & S. F. Ry. Co.*, 230 N. Y. 158, 165.

Of these cases, only the *Boyd* case and the *Bankers Trust Co.* case represent decisions on the point for which they are cited.

some 90 years, appellant's rights under this contract were subject to the risk that Warner, if it infringed any law during the life of the guaranteed lease, would have to pay the penalty imposed for violation. The consent decree, assuming that it bars assumption of the guaranty contract by the new picture company, affects appellant only by removing Warner's production and distribution assets as a source of possible payment if appellant finds it necessary to enforce Warner's guaranty. This effect is no different in character from that of any judgment against Warner which would deplete its assets, for example, a large money judgment entered on a debt incurred for any corporate purpose (including embarking upon a new line of business), large money judgments entered against it for treble damages on account of antitrust law violation, or a large money judgment against it for fines imposed for violation of a state or federal statute.

If appellant is "adversely affected" by the consent decree, then so is every holder of a direct or a contingent claim against Warner since the decree does not provide for joint and several assumption of Warner's liabilities by Warner's transferees, nor does the reorganization plan adopted by Warner so provide (*supra*, note 16, pp. 18-19). To place this interpretation upon the intervention rule would mean that whenever a court is faced with the difficult task of bringing about divorceement of

the property or business of one who had offended against the antitrust laws the court would also be required (a) to determine the extent to which every third party claimant had a valid claim against the defendant, (b) to ascertain the extent to which divorcement might conceivably indirectly prejudice such claimant, and (c) to adjudicate the relief to be awarded each claimant. The rule on intervention of right plainly was never intended to have such a reach or such obstructive effect.

II

Appellant has no standing under the provisions of Rule 24 (b) to obtain "permissive intervention" and, in any event, denial of appellant's requested intervention was not an abuse of the district court's discretion

The circumstances under which the court may, in its discretion, permit intervention are set forth in Rule 24 (b) of the Federal Rules of Civil Procedure (*supra*, p. 4). Clause (2), upon which appellant relies, authorizes grant of intervention "when an applicant's claim or defense and the main action have a question of law or fact in common."

In the instant case the main action involved only questions relating to defendant's violation of the Sherman Act and the remedies appropriate to prevent further violation. Appellant's claim, on the other hand, involved the scope of its rights under a guaranty contract "unrelated to" any antitrust violation by Warner or by any other defendant (R. 29, App., Br. 10). Appellant's

claim was that, upon transfer of Warner's property to two new corporations and its dissolution, as required by the consent decree, Warner's obligations under its guaranty contract should bind its transferees jointly and severally. This claim has no question of fact or law in common with a question arising in the main action.

On February 8, 1950, the district court had entered a judgment against Warner which required it to submit a plan providing for completion of separation of its production and distribution business from its exhibition business within three years from the date of the judgment (R. 5, 8). The motion to intervene which appellant filed in January 1951 did not question this requirement or the means for achieving it embodied in the consent decree—transfer of Warner's assets to two new companies and dissolution of Warner (App. Br. 14, 22). The claim made by appellant was that the court dealt with its rights under Warner's guaranty contract either in the consent decree or "by separate order" by "ascertaining and awarding an equivalent substitute" for Warner's guaranty (App. Br. 21). The ascertainment and award of such "equivalent substitute" presents no question "in common" with a question in the main action. The question before the district court on the consent decree submitted by the parties was whether transfer of Warner's assets and its dissolution pursuant to a plan of reorganization to be adopted by Warner

would effectively achieve the divorceinent which the district court had found to be essential to adequate relief in the antitrust litigation against Warner (R. 62-63, 66-68, 117). If appellant's claim had a question in common with that of the main action, then so had everyone who at the time of the consent decree had either a direct or a contingent claim against Warner.

Although permissive intervention was authorized only if appellant's claim and the main action had a question of law or fact in common, appellant's brief deals with this matter only in the last sentence on page 21. The view there expressed appears to be that because appellant asked the district court either to add something to the consent decree or to make some kind of "separate order" its claim and the main action both involved the court's action on the proposed consent decree and therefore had a "common" question. Appellant ignores the crucial consideration that the questions concerning the court's action raised by appellant lie outside, and are totally distinct from, the questions raised in the main action.

But even if it be assumed *arguendo* that Rule 24 (b) empowered the district court to grant appellant's motion for leave to intervene, it is clear that denial of the motion was not an abuse of discretion. Where the basis for intervention is an appeal "to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their

individual emphasis," the question whether or not the circumstances are such as to warrant permitting the interested outsiders to become participants in the litigation "is, barring very special circumstances, a matter for the *nisi prius* court." *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 506.

Rule 24 (b) provides that the court, in exercising its discretion, "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In the present case the court had the task of entering a judgment which would recast the business and property interests of a large and complex enterprise. Although this task was simplified when the parties formulated and agreed upon an appropriate decree, the carrying out of the provisions for divorcement and for divestiture of individual theatres inevitably entails repeated applications to the court for the determination of matters which are in dispute between the parties or for modification of particular provisions of the decree. To permit third persons to intervene to obtain adjudication of claims asserting merely that Warner's reorganization might be carried out in such a way as to impair rights of Warner's obligees would interject into the main action a host of digressive, difficult, and delaying issues.

In the hearing below Judge Hand commented that there "must have been a great many situa-

tions like this in this case," and counsel for Warner concurred (R. 220).¹⁹ In fact, there were many like situations. Warner had guaranteed leases, on property leased to subsidiaries, involving minimum annual rentals of about \$1,484,000.²⁰ Since the current annual rental on the property leased from appellant was \$300,000 (R. 36), Warner had outstanding other lease guarantees covering annual rental payments of about \$1,184,000. If appellant had been permitted to intervene, the door would have been thrown open, or at least left ajar, to intervention by the holders of these various guaranty contracts. Grant of intervention to them and to other like holders of claims against Warner would have expanded the main action beyond all reasonable bounds, and might have prevented, for an unforeseeable period, entering and carrying into effect any final judgment in the cause. In the district court hearing counsel for Warner observed that "if this Court is going to allow everybody to intervene that has a claim like that [of appellant]

¹⁹ Judge Coxe suggested that the "problem" posed by the appellant's motion—that the required reorganization of Warner might be carried out in such a way as to impair appellant's rights under its contract with Warner—would arise in the case of any employee having a five year contract with Warner (R. 221). And Judge Hand observed that there are questions of leases, "innumerable things," affected by the consent decree which the parties had presented to the court (R. 222).

²⁰ See Warner's proxy statement (p. 27), referred to *supra*, note 16, p. 18.

and try to settle everyone of those claims * * *, this Court is hamstrung and we can't ever get ahead." (R. 220-221).

Appellant states that it had "no desire to disturb or delay" entry of the consent decree (App. Br. 22). But whatever appellant's desire, this would have been the necessary effect of granting intervention. The consent decree was an elaborate, interrelated document representing, as always in a situation of this kind, concessions and compromises by the opposing parties (R. 209). The district court, had it granted intervention, could have awarded the relief prayed by appellant only in one of two ways—(1) with the consent of the parties, which consent plainly was not forthcoming, or (2) by fashioning its own judgment after a full hearing involving taking of evidence, formal briefing and argument. Furthermore, both the appellant (having been allowed to intervene) and any party to the main action would have the right to appeal to this Court from the judgment thus entered. The important time schedule respecting divorceement incorporated in the consent decree, including approval of the required plan of reorganization by Warner's stockholders within 90 days after entry of the decree, would have been totally disrupted.²¹

²¹ The Warner proxy statement previously mentioned (*supra*, note 1A, p. 18) shows the elaborate and detailed presentation which had to be submitted to Warner's stockholders, and the annual stockholders meeting was to be held in Feb-

Under the foregoing circumstances, denial of appellant's intervention motion clearly was a proper exercise of discretion, and appellant's reliance upon Rule 24 (b) is misplaced.

The remote, speculative, and contingent character of any injurious effect of the consent decree upon appellant further supports denial of its intervention motion, as a matter of discretion. At the hearing below, counsel for the United States and counsel for Warner both indicated that the reorganization plan which Warner expected to adopt would provide that the new theatre company would assume Warner's guaranty contract (R. 220).²² The issue which appellant sought to interject—whether appellant would receive less than its due without a like assumption by the new picture company—raised the question of whether the new theatre company's assumption of liability would be an "equivalent substitute" for Warner's guaranty, a question

ruary (R. 220). Even a short delay in entering the consent decree would thus have been seriously disruptive.

As to the importance of completing divorce by April 4, 1953, as required by the consent decree (R. 26), attention is called to the fact that this date is almost seven years after the district court first determined the issues in the case and almost five years after this Court passed on the district court's determination and judgment (see 66 F. Supp. 323; 334 U. S. 131). The main action has been pending since 1938 (*supra*, p. 4).

²² Government counsel also stated that he was "unalterably opposed to" assumption of the contract by the new picture company since such assumption would give it an interest in the exhibition business (R. 220).

which could not be determined until Warner's reorganization had progressed to a point where the assets and earning power passing to the new theatre company had become finalized. Warner's counsel observed that the assets of the new theatre company would be "enormously more than enough" to give appellant "every assurance" (R. 220). Judge Goddard, addressing appellant's counsel, inquired: "How do you know that you won't receive complete protection?" (R. 221).

Even explicit contract or property rights against one who has violated the antitrust laws must give way where they stand as an obstacle to an appropriate antitrust judgment against the violator and the holder of such rights may not, in this situation, enforce the "letter" of his contract (*Continental Insurance Co. v. United States*, 259 U.S. 156, 171-173). It is thus clear that appellant was not entitled, as a matter of law, to assumption of Warner's guaranty by the new picture company. All that appellant was entitled to, and all that it has demanded, is an equivalent "substitute." Obviously such substitute can be obtained through the medium of the new theatre company, whether solely by its assumption of the guaranty or by such assumption and something more (see *supra*, p. 21).

The reorganization plan adopted by Warner provides for an allocation of assets and liabilities which gives the new theatre company, on the basis of Warner's assets and liabilities on August 31, 1950, assets of more than \$80,000,000

in excess of all liabilities; and the average annual net profit (after taxes) earned during the last five fiscal years on the part of Warner's business allocated to the new theatre company was more than \$10,375,000.²³ But even after submission of the reorganization plan formulated by Warner and approval of the plan by Warner's stockholders, the district court would not be in a position to determine the issue which appellant sought to interject into the main cause. Substantial changes in the assets received and the liabilities assumed by the two successor companies were expected to occur before reorganization was carried into effect,²⁴ which might be as much as 27 months after entry of the decree (R. 26).

Plainly the district court might, as a matter of discretion, refuse intervention where the requested intervention was, as here, based on a claim of injury which was purely speculative and contingent upon unknown future factors. If, on the actual reorganization of Warner, appellant then believes that it is being given less than its legal due, it will be free to assert in other proceedings any rights claimed against Warner

²³ Page 11 of Warner proxy statement (referred to *supra*, note 17, p. 18).

On the above basis, the net assets going to the new picture company are about \$49,730,000 and the average annual net profit earned by its part of Warner's business is about \$4,450,000 (proxy statement, pp. 14-15).

²⁴ Proxy statement, p. 5.

and Warner's transferees. Denial of permissive intervention necessarily implies that "the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. R. Co.*, 331 U. S. 519, 524.²⁵

III

There is no merit in appellant's contention that, apart from the rules governing intervention, the district court was under a duty to grant appellant the relief for which it sought intervention.

We have shown under points I and II that appellant had no right of intervention, and that it had no standing to invoke permissive intervention and that in any event denial thereof was not an abuse of discretion. We now take up certain contentions made by appellant which, at best, have only a tangential bearing on these central issues.

A. Appellant is not without "adequate remedy" except by intervention

Appellant contends that it "has no adequate remedy except by intervention" (App. Br. 25-27). We have previously shown that denial of intervention leaves appellant free to assert in other proceedings the rights which it has or claims under Warner's guaranty (*supra*, pp. 16-18, 36-37). The

²⁵ See also *supra*, pp. 16-18.

modes of relief thus available are those which would be available if Warner, pursuant to a voluntary plan of reorganization, proposed to or did transfer its assets to two new corporations and then dissolve. The relief which appellant seeks by way of intervention is that the court in the antitrust proceeding against Warner adjudicate and award the rights given appellant by virtue of the general equitable principle that a successor corporation, where the stockholders are the same, remains liable for unsatisfied obligations of its predecessor. General law, not the Sherman Act, provides the remedies for enforcing this equitable principle. Appellant, being entitled to pursue these remedies, may not set up their alleged inadequacy as ground for interjecting itself into a proceeding to which it is a stranger.

Appellant suggests that a cause of action against Warner may not accrue until default by appellant's lessee and that this may occur after Warner's corporate existence has terminated. This Court has declared that "as a matter of substantive law, the right to follow the distributed assets" of a corporation "applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims" and, that a "corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim, or the obligee of an executory contract" * * * *." *Pierce v. United States*, 255 U. S. 398, 403. The decisive consideration here, however, is that ap-

pellant's situation with respect to modes of relief is the same as it would be upon a voluntary reorganization of Warner. The procedural problems which may confront appellant in pursuing its remedies under general law are thus irrelevant.²⁶

B. The district court was not under a duty to ascertain and award an equivalent substitute for Warner's guaranty

Appellant contends that it "is entitled to a judicially ascertained equivalent substitute for the Warner guaranty" (App. Br. 27-30). The Government does not dispute this general proposition; but it does dispute that appellant is entitled to intervene in the antitrust proceeding to obtain such judicial ascertainment. It also denies that *Continental Insurance Co. v. United States*, 259 U. S. 156, is, as appellant states, a precedent "supporting Appellant's right to have the court below ascertain and provide" such equivalent substitute (App. Br. 28).

The *Continental Insurance* case was an appeal from the judgment entered by the district court pursuant to this Court's mandate in *United States v. Reading Co.*, 253 U. S. 26. That case held that the defendants were parties to a combination illegal under the Sherman Act and that the district court should enter a decree dissolving

²⁶ Among such possible remedies are a suit for a declaratory judgment and a proceeding on equitable principles against Warner's transferees when and if default by appellant's lessee provides occasion therefor.

this combination in such a way that the holding company (Reading Company) and two of its subsidiaries (Reading Railway Company and Reading Coal Company) should each be entirely independent from the others. The holding company had outstanding some \$93,000,000 of non-callable bonds secured by a mortgage covering substantially all the assets of these two subsidiaries. After remand to the district court; the trustee under this mortgage was, upon supplemental bill filed by the United States, answer by the trustee, and order of the court, made a party defendant.²⁷ The district court subsequently entered a decree of dissolution which, among other things, provided for merger of the Reading Company and the Reading Railway Company and left the mortgage securing the Reading Company's bond issue a lien upon all the capital stock and assets of the Reading Coal Company.

On appeal from such decree, this Court held that it did not sufficiently safeguard against "some possible measure of future control over the Coal Company" by the Reading Company (259 U. S. 167), and that changes should be made in the decree involving "a departure from the contract provisions of the general mortgage and the bonds it secures" (*id.*, 170). The district court was directed to determine the respective

²⁷ *United States v. Reading Co.*, 273 Fed. 848, 855-856 (E. D. Pa.). See also Record in Nos. 609, 610, October Term, 1921, pp. 48-50, 150-152, 205.

values of the property of the merged Reading Company and that of the Coal Company subject to the lien of the mortgage, and to enter a decree providing that the liability of each company on the bonds and the pledge under the mortgage "shall be reduced to an amount proportionate to the ratio of the value of its pledged property to the value of all the property pledged" under the mortgage (*id.*, 173).

The Court in the *Continental Insurance* case thus found it necessary to enter a judgment in the antitrust proceeding changing in a particular manner the antitrust defendants' specific contract obligations and direct liens on their property running to others, and the legal representative of such others was a party defendant. The extent and character of the changes to be made in the contract rights and property liens running against the antitrust defendants was inherent in determining requisite relief against them under the antitrust laws. No question was before the Court similar to that in the present case—interjection into the antitrust proceeding of the extraneous issue of some remote, contingent and speculative effect of the antitrust judgment on an obligee of the defendant.

We think it sufficient answer to appellant's due process contention (App. Br. 30-32) to point out that appellant was given a hearing on its intervention motion and that the consent decree

does not foreclose appellant as to the rights which it may have by reason of Warner's guaranty.

CONCLUSION

For the foregoing reasons, the district court's order denying intervention was correct and should be upheld.²⁸

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
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CHARLES H. WESTON,

Special Assistant to the Attorney General.

OCTOBER 1951.

²⁸ In *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137, where the Court determined that the appellant was not entitled to intervene "as of right" and that, with respect to "permissive intervention," the district court had not abused its discretion in denying intervention, the appeal was dismissed (322 U. S. 143). But in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, where the provisions of the decree which were the basis for an asserted right of intervention were eliminated by this Court on the appeal taken by the parties to the cause, the Court said that the orders of the district court denying intervention "must be affirmed" (334 U. S. 178).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.,**Appellees.*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF WARNER APPELLEES.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF WARNER APPELLEES.

Statement.

No facts were alleged in the petition below, and none has here been suggested, to show that the guaranty tendered by the New Théâtre Company was not a proper equivalent for the present guaranty of the integrated company, consistent with the basic purpose of divorceement sought by the Government and ordered by the Statutory Court below and affirmed by this Court.

The Statutory Court which has had to struggle for so long with this complicated situation should not

have its discretion disturbed as to the extent to which the relief sought by Appellant might tend to weaken or impair the effectiveness of any appropriate remedy.

If these considerations are not in themselves controlling, Appellant is faced with the additional hurdle that, under the circumstances here, this application was not timely within the meaning of the Federal Rules of Civil Procedure.

I.

Under the circumstances, the application was not timely.

Appellant did not make "timely application" for intervention under Rule 24 (a) and (b) of the Federal Rules, because the relief which it asked in its tardy 1951 application was inconsistent with the Government's basic claim: since the inception of this action in 1938, the remedy sought by the Government was total divorce of theatre operation from production and distribution, and this was the position which the Government consistently urged on the Statutory Court.

Appellant asked below (and here) relief which would have impaired or weakened the divorcement sought by the Government and ordered by the Statutory Court below and affirmed by this Court.

Appellant's claim was and is that any decree which divorces its ninety-nine year theatre ~~guaranty~~ from the production and distribution business will

adversely affect its guaranty. Its petition below prayed for a guaranty "which shall include an assumption of said guaranty obligations jointly and severally by the two new transferee corporations proposed to be formed" (R. 41). Its brief here states that "The substitute prayed for is the guaranty of both new companies * * *" (p. 14).

Appellant's petition, dated January 2, 1951 (R. 41), was made over twelve (12) years after the Government had brought this action in 1938, seeking divorceement of theatres from production.

It knew, or should have known, since 1938, that the outcome of this action might affect its theatre guaranty, and that, if the Government's contentions as to the Anti-Trust Laws were upheld, a production company might no longer be permitted to have any financial stake in any theatre, directly or indirectly.

Since the inception of this action in 1938, the Government has insisted that divorce be decreed against the integrated motion picture companies.* Before Appellant sought intervention there had been two opinions and decrees of the District Court, two appeals to this Court, and the entry of two consent judgments against other defendants.

When this Court in 1948 reversed a decree of the District Court with instructions to make a new start on the issue of divorceement, Appellant should have realized that such relief was more than a mere possibility. The entry of consent judgments of divorce and dissolution against RKO in 1948 and against

* In the Consent Decree of 1940 the Government merely agreed to a standstill period of three years during which it would not seek divorce.

Paramount in 1949, and the opinion of the District Court on remand in 1949 that divorcement should be decreed and plans therefor be submitted by September 20, 1949, constituted notice to Appellant to seek to intervene if it desired to assert the right to have the production company continue to have an interest in a theatre guaranty.

Appellant contends at page 15 of its brief that, although it knew that the February 8, 1950 decree compelled Warner to divorce, it did not know until shortly before the presentment of the Warner consent judgment that Warner would be required to transfer all of its assets to two new companies and to dissolve.

But the fact that the Warner consent judgment provides for dissolution to effectuate divorce does not alter the situation. For whatever the form divorcement had taken, Appellant would still contend, as it does, that it is entitled to a guaranty backed by all of Warner's assets. Moreover, similar dissolution of the parent company was provided in the consent judgments of RKO and Paramount entered approximately two years before.

To permit the Appellant to intervene at such a late date and secure what was not provided for under any of the Plans of Reorganization theretofore consummated would delay and impair the efficacy of the complicated reorganization which Warner was obligated to carry out.

Appellant did not make "timely application" as required by Rule 24 (a) and (b) of the Federal Rules of Civil Procedure.

II.

The petition alleged no facts to show that the guaranty of the New Theatre Company would not be a reasonable equivalent, consistent with the basic purpose of divorceement.

Appellant's lessee was a subsidiary with interests in a dozen of the 400-odd Warner theatres, the lease being guaranteed by the parent production and distribution company. Appellant therefore had no direct security as against the bulk of the 400-odd Warner theatres, and was subject to any hazards of the production and distribution business.

Admittedly, Appellant will have the guaranty of the New Theatre Company to which all the theatre assets will be transferred [Government's Br., p. 19, footnote 11, par. (4)].

The equivalent tendered, following the basic purpose of divorceement, divorces the guaranty from the production and distribution business, but is a guaranty by the New Theatre Company which will have, directly or indirectly, *all* of the Warner theatres. Moreover, such new guaranty is free of the hazards of the production and distribution business.

As the Government's brief points out (p. 20, footnote 12), the New Theatre Company will have total assets of \$92,113,628, and capital stock and surplus of \$80,432,375.

No facts were alleged which showed even a remote possibility that Appellant would not be protected as

well as it could be protected consistent with the letter and spirit of the Anti-Trust Laws as construed by the courts.

Exact equivalence of a ninety-nine year lease guaranty, upon which Appellant grimly insists, is impossible if the decisions of divorcement under the Anti-Trust Laws are to be effectively enforced.

The petition alleged no facts which indicate that the equivalence resulting from the Consent Judgment will cause Appellant to lose a single penny, and any surmise that its ultimate security may be lessened must stem, basically, from the separation of exhibition from production, *i. e.*, from what this Court has decreed is required by the Anti-Trust Laws.

An "equivalent substitute" cannot be a substitute which would impair the remedy deemed to be necessary under the Anti-Trust Laws, by tying for seventy-five years more the production-distribution business to the tail of exhibition under the guise of an "equivalent" guaranty. As the Government told the Statutory Court (R. 220):

"Now we are unalterably opposed to that because the very purpose of this judgment is to effect a complete separation of the picture company from the exhibition interests and the exhibition company from the distribution and production interests. To put the picture company in the position of a guarantor of a theatre is to give it an interest in the success of that theatre and to give it an interest in the exhibition business."

III.

This Court should not disturb the discretion exercised by the Statutory Court as to the efficacy of the remedy which it deemed necessary fully to effectuate divorce.

In denying the application, the Statutory Court undoubtedly considered the effect of Appellant's claim upon the proper enforcement of the Anti-Trust Laws, and rejected the propriety of a production company continuing for seventy-five years longer to be financially affected by the operation of a large Broadway theatre in New York City.

Questions such as the scope of the remedy appropriate under the circumstances, the extent to which relief sought by intervenor may tend to weaken or impair the effectiveness of any appropriate remedy, and the timeliness of a last minute application for intervention which might tend further to delay the end of a twelve-year litigation, were and are primarily for the Statutory Court which has lived with all its complicated problems.

Its resolution of such questions are entitled to consideration, including its denial of Appellant's tardy petition for intervention.

CONCLUSION.

The order should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., ET AL.

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

Appellant respectfully prays for a rehearing of this appeal or a reconsideration by this Court of its decision announced November 5, 1951.*

In its opinion this Court holds that although this is a case of "a distribution or other disposition of property which is in the custody or subject to the control or disposi-

* By an order dated November 20, 1951 and signed by the Chief Justice time to file this petition was extended to and including November 30, 1951.

tion of the court *** within the meaning of Rule 24(a)(3), nevertheless Appellant may not be permitted to intervene because it has not shown that "it will be 'adversely affected' by the reorganization." Evidently the Court has acted under a misconception as to the record. Appellant's burden was to show that it was adversely affected by the Consent Judgment and not by a plan of reorganization which never has been and is not now before the court.

Our moving papers disclosed that under the proposed Consent Judgment, then about to be entered, the assets of the Warner enterprises were to be dispersed, and Warner, the corporate guarantor on Appellant's lease, was to be dissolved (R. 34, par. 3; R. 38-39, par. 8). These facts were not disputed and indeed could not be disputed. Furthermore, these are the only record facts relevant to the issue presently before this Court.

The adverse effect of such Consent Judgment upon Appellant's guaranty is self-evident and devastating, beyond dispute.

The holding here is not that Appellant has failed to show that it will be adversely affected by the Consent Judgment but that it has failed to show that it will be adversely affected by "the reorganization"; and particularly in that it has failed to show any inadequacy of "the guaranty of the new theatre company".

This ruling could have resulted only from the assumption that "the plan of reorganization" was before the court below and constitutes a part of the record in this Court. It was not and is not.

Appellant's motion was denied from the bench at the hearing on January 4, 1951 and the Consent Judgment was entered on the same day (R. 31-2; 8-30).

The Consent Judgment provided that within ninety days thereafter Warner should present to its stockholders a plan of reorganization to effect a divorcement of its theatre assets from its production and distribution assets; that said plan should provide for a distribution of such assets and for the dissolution of Warner (R. 25, par. VI, A). It was not required or intended that such plan of reorganization should be submitted to or be passed upon by the court.

Following the Consent Judgment a proxy statement thereafter prepared and dated January 11, 1951, was sent out to the Warner stockholders containing a plan of reorganization. A meeting of stockholders of Warner was held on February 20, 1951 and the plan was approved (R. 224-5).

Appellant could not be called upon to show that it was adversely affected by matters which not only were not of record, but which had not even come into being. Thus the holding here rests upon assumptions of fact entirely *de hors* the record.

This Court may have been misled into assuming that the plan of reorganization had been passed upon by the court below and was part of the record here, by reason of the fact that at the request of the Solicitor General copies of the proxy statement were distributed to the members of this Court with the record and briefs on the argument of the appeal. Certainly, however, it could not have been intended to incorporate in the record a plan of reorganiza-

tion which was not submitted to the court below, was not promulgated until after the hearing on Appellant's motion, and was not in existence at the date of the hearing. (It was indicated on the hearing that a proxy statement was to be or was being prepared. R. 218, ff. 208-22; R. 219, ff. 208-23).

Surely the adverse effect of a plan which came into existence after the entry of the judgment appealed from could not have been litigated in the court below and cannot be litigated *ab initio* in this Court.

At no time has Appellant had an opportunity to show that it would be adversely affected by the plan of reorganization or that the suggested guaranty by a new theatre company is inadequate.

When Appellant had its day in court the plan of reorganization was nonexistent and there was no provision (and there still is none) anywhere for a new guaranty by anybody. There was nothing before the Court but the proposed Consent Judgment.

When Appellant had its day in court it was limited on the record to showing that it would be "adversely affected" by the proposed Consent Judgment; and that it did.

Since Appellant would be adversely affected by the proposed Consent Judgment it was entitled as a matter of right to intervene and have a judicial ascertainment of an equivalent substitute for the guaranty which was about to be destroyed. It is now denied that right upon the ground that it has failed to show that it was adversely affected by a subsequently adopted plan of reorganization, not of record.

Appellant submits that it is entitled to intervene and to have a determination of the issues to be joined on its pleading in intervention.

WHEREFORE Appellant prays that this Court reconsider this appeal and reverse the order denying Appellant's motion to intervene.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel for Appellant.

